JUN 1 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1942

No. 1059 76

DANT & RUSSELL, INCORPORATED,

Petitioner and Appellant,

vs.

BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, and WILLIAM A. SMITH, DOCTOR OSCAR HAUGE, ROGER JESSUP, JOHN ANSON FORD and GORDON L. McDONOUGH, as members of and constituting said Board of Supervisors of the County of Los Angeles, State of California, and J. H. O'CONNOR, County Counsel of the County of Los Angeles, State of California,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE HONORABLE SUPREME COURT OF THE STATE OF CALIFORNIA, AND BRIEF IN SUPPORT THEREOF.

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BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, and WILLIAM A. SMITH, DOCTOR OSCAR HAUGE, ROGER JESSUP, JOHN ANSON FORD and GORDON L. MCDONOUGH, as members of and constituting said Board of Supervisors of the County of Los Angeles, State of California, and J. H. O'CONNOR, County Counsel of the County of Los Angeles, State of California,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE HONORABLE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petition of Dant & Russell, Incorporated, respectfully shows:

Summary and Short Statement of the Matter Involved

An application for a writ of mandate was filed by the petitioner in the Superior Court of the State of California, in and for the County of Los Angeles, directed to respondents as the Board of Supervisors of said county, to compel said Board to cancel personal property assessments levied by the County Assessor for general county purposes, upon Philippine mahogany lumber imported by, owned by petitioner and located in the county. Under the circumstances alleged it is apparent that the lumber was not subject to county taxation and hence the Assessor and Board of Supervisors exceeded their jurisdiction in levying the tax.

The lumber was milled and finished in the Philippines, then shipped to Long Beach in said Los Angeles County. There it was unloaded from the steamship carriers and stored in piles in the yard of a warehouse. The lumber was shipped in individual pieces, not packed nor in any manner bundled together; this is the manner customarily employed by purchasers and shippers of lumber dealing therein. When unloaded it was stacked in piles, one piece upon another. Each shipment was piled separately and kept to itself. From the piles of lumber thus received portions were sold to customers outside of the State of California. No improvements on the lumber were ever made, but it was ever maintained in the original condition in which it was received from the steamship carrier from the Philippine Islands, both as to form and title.

The County of Los Angeles assessed a tax for general county purposes against the lumber of petitioner remaining in the yard at Long Beach on the first Monday of March, 1938, and, also a second assessment was made

on the lumber remaining in the yard on the first Monday in March, 1939. Petitioner paid taxes on these assessments respectively of $276.43 and $521.20; a total of $797.63.

The respondents interposed a general demurrer to the application for writ of mandate as amended. This demurrer, by the trial court, was sustained without leave to amend and judgment denying the application was entered.

Appeal was perfected by petitioners to the District Court of Appeal of the State of California. By the decision of this court the judgment of the trial court on the demurrer was reversed and respondents granted a reasonable time within which to answer.

Respondents thereupon sought a hearing in the Supreme Court of the State of California, which was granted. The case came on before the Court and was submitted upon the briefs on file. Subsequent to the submission the Supreme Court permitted the Attorney General of the State of California to file, as *amicus curiae*, a brief. This brief injected an entirely new point in the controversy. It advanced the theory that the Philippine Islands are not a foreign country and goods arriving therefrom are in interstate commerce; that the constitutional prohibition against the levy of taxes by the state apply only to "foreign countries". This brief came in after submission and no replies thereto were made. The Supreme Court affirmed the judgment of the trial court, but relied solely on the single point raised by the Attorney General and held that the provisions of Article I, Section 10, of the Constitution of the United States that "no state shall, without the consent of the Congress, lay any impost or duty on exports or imports" referred exclu-

sively to goods shipped from a foreign country and inasmuch as the lumber came from the Philippine Islands the lumber in question did not constitute an importation.

Timely motion for a rehearing was made by petitioner and in petitioner's brief the fallacies of the position of the Attorney General and Court were shown, but this motion was denied without an opinion. Thereby the judgment of the trial court on sustaining the demurrer without leave to amend has been affirmed and a final determination of the case has been had in the courts of California. Nothing is left for the trial court to do except to enter judgment for the costs on appeal.

Statement of Jurisdiction.

Petitioner, in argument on its application for the writ of mandamus, and throughout the course of the case in the state courts, specially set up and claimed the right, privilege and immunity from state taxation of its imports of lumber from the Philippine Islands into the United States under the provisions of Article I, Section 10, Clause 2, reading as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; and the net Produce of all Duties and Imports, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

In its petition for the writ petitioner alleges that its property, to wit, the taxes paid, was taken without due process of law and contrary to its rights and immunities

under the Fourteenth Amendment to the Constitution of the United States, in that the property involved was not part of the mass of property of the state, but was immune from such taxation under the above stated clause of the Federal Constitution.

It is accordingly believed that this case is one proper for this application for the issuance of the writ of certiorari directed from this Honorable Court to the Supreme Court of the State of California under the provisions of Subdivision b. of Section 344 of Title 28, United States Code.

The Questions Presented.

The questions presented to the Court in this case, concisely stated, are:

First: Is lumber or other merchandise commercially imported into a state of the United States from the Philippine Islands an import under the purview of Clause 2, Section 10, Article I, of the Constitution of the United States?

Second: Is milled and finished lumber, not packed nor bundled together, but imported by the owner thereof into the State of California in individual pieces in the manner customarily employed by purchasers and shippers of such lumber and then unloaded from the import carrier, stacked in piles, one piece upon another, unchanged in condition or title from date of importation, subjected to a personal property tax of the county in which it is located, by reason of the sale of a portion thereof?

Third: Were the taxes exacted by and received by the county under the guise of its statutory lien taken without due process of law?

Proceedings in the Trial Court.

The petition for writ of mandate [R. pp. 1-8, incl.] alleged that petitioner purchased the lumber in the Philippines all milled and finished, shipped it into California, removed it from the steamship carrier, stacked it in piles, one board on another, and at the respective dates of assessment it was in the identical form as imported. Petitioner paid, in order to release from sale, total taxes of $797.63. Petitioner further alleged that it had no plain, speedy or adequate remedy in the ordinary course of law; that the tax was void: that by said void provisions of the law, its property would be taken without due process of law in contravention to the 14th Amendment to the Federal Constitution.

The respondents interposed a general demurrer. In the argument upon the general demurrer the prohibition of state taxation upon imports of Article I, Section 10, Clause 2, became the center of dispute. This is evidenced by the opinion of the trial court rendering judgment sustaining the demurrer without leave to amend. [R. pp. 12-23.]

The trial court would have granted the writ, as its opinion shows, except for its reliance upon the fallacious reasoning of the Supreme Court of Maine in the case of *Mexican Petroleum Corporation v. South Portland,* 121 Me. 128 (26 A. L. R. 965). Influenced by this decision, it held that a shipment of lumber imported from the Philippines in the customary manner used by dealers there, that is to say, in individual parcels and not packaged or bundled together, constituted as a whole one original package of import. A sale made from that shipment broke the original package. Thereby, notwithstand-

ing the admitted fact that the lumber was scrupulously retained in the original piles, separated from all other property, through a recondite process it became mingled with the property of the state and the owner and importer waived the constitutional immunity from taxation given by Section 10, Article I, of the Federal Constitution.

Decision of the District Court of Appeal.

The opinion on appeal squarely reversed the trial court and held:

> "The law is settled that a state or a subdivision thereof may not constitutionally levy a tax upon a thing during the time it retains its character as an import and remains property of an importer in a warehouse in the original form or package in which it was imported." (Citing Article 1, Section 1, Federal Constitution and Brown v. Maryland and May v. New Orleans.)

It further held that the original package was each individual piece of lumber, since the lumber was not bundled or in any manner bound together and was the identical thing delivered by the consignor to the carrier at the initial point of shipment, and it so remained at all times here in question, and further held that the rule of the Maine case relied upon by the trial court had been expressly disapproved as the law of California. The result of these holdings necessarily gave the rule that the intact remainder of one shipment, consisting as it did of various original packages, was not subject to state taxation. The Court elaborated upon this rule by showing that the mere inclusion of thousands of individual packages into one gross shipment did not change the

character of each piece of lumber as an original package. It clearly stated:

> "The county was without authority to levy a tax upon the lumber which remained in the original packages, and which had not, under the admitted facts, been mingled with the mass of property of this state."

Decision of Supreme Court.

The Supreme Court noted that petitioner contested the taxes involved "on the ground that they are imposed on imports in violation of the provision of Article 1, Section 10, of the Constitution of the United States"; but held that the word "imports" referred exclusively to goods shipped from a foreign country; that the Philippines were not such and therefor the lumber did not constitute an import. It refused to otherwise pass upon or decide the question raised in the trial court and decided by the District Court of Appeal, although requested so to do upon petition for rehearing.

Specification of Errors.

The trial court erred as matters of law in its ruling upon the demurrer in that:

1. It held that thousands of individual parcels of lumber shipped at one time constituted one original package contrary to the admitted averments of the pleading.

2. It held that sale of one or more individual parcels, each constituting an original package, out of a total shipment, subjected the remainder to state taxation.

3. It relied upon and based its decision on the Maine case which had expressly been disapproved as the law of California in the case of *Philippine Refining Corp. v. Contra Costa,* 24 Cal. App. (2d) 665-9.

4. It refused to give effect to the rule of *Brown v. Maryland* that the importation under the Federal law gives the right to sell the thing imported and such right cannot be forbidden.

5. It refused to give effect to the rule of *May v. New Orleans* "that a tax upon the thing imported during the time it retains its character as an import and remains the property of the importer in his warehouse in the original form or package in which it was imported is a duty on imports within the meaning of the Constitution."

The Supreme Court of California erred as a matter of law in its ruling in that:

1. It held that the Philippine Islands, although an unincorporated territory, were domestic within the revenue clauses of the Constitution and subject to the interstate commerce clause.

2. It held that "imports" within the meaning of Article 1, Section 10, Clause 2, refers solely to goods brought into the United States from a country entirely foreign to the United States.

3. It held that imports from the Philippine Islands, once having come to a state of rest in one of the states, are subject to state taxation and form a part of the mass of the property of the state.

Reasons for Allowance of Writ.

Your petitioner respectfully shows that this case is of great and unusual importance for the following five reasons:

1. Governmental: The Insular Tariff Cases determined that the Spanish acquisitions were "foreign to the United States in a domestic sense," not a part of the United States within the revenue clauses of the Constitution, and outside of the restrictions applicable to interstate commerce. The opinion of the Supreme Court of California is in direct opposition to the rule determined by those cases and thereafter consistently acted upon by Congress. This disrupts the very basis of the relations between the states under the compact of the Constitution.

2. Taxation: The decision at bar holds that imports from the Insular possessions are subject to the rule of interstate commerce that shipments when they come to rest are a part of the mass of state property, subject to state taxation and exempt from Federal in opposition to the provisions of Article 1, Section 10, United States Constitution.

3. Jurisdiction: This case is one of first impression in the construction of Article 1, Section 10, of the Constitution applied to imports from the Insular possessions in respect to state taxation.

4. Conflict of Decisions: There exists a direct conflict respectively among the different State Supreme Courts and the Federal Circuit Court of Appeals upon the question of when imports become a part of the property of the state so as to lose the immunity from state taxation under the Federal

Constitution: there is like conflict as to the point above specified in paragraph 2.

5. Practical: The solution of the serious questions here involved is of great and increasing importance to the vast import business of the nation. There are a number of cases awaiting the final decision on this case involving shipments not only from the Philippines, but from Australia and South and Central America.

Your petitioner shows in its brief hereto attached that the case is of universal importance on each of the grounds above stated and therein presents the authorities and reasoning to sustain its position, and presents herewith a certified copy of the entire record in said cause, including the proceedings in the trial court and the Supreme Court of the State of California, and the opinion of said Court.

WHEREFORE, your petitioner respectfully prays that this Honorable Court order that its writ of certiorari issue, directed to the Supreme Court of the State of California, requiring it to certify to this Court a full, true and complete copy of its proceedings and records in the matter for the purpose of review and reversal, and for any other and further adjudication thereon as may to this Court seem fit and proper.

HENRY C. ROHR,
650 South Spring Street, Los Angeles,
Attorney for Petitioner.

LOUIS B. STANTON of
STANTON & STANTON,
Of Counsel.

State of California, County of Los Angeles—ss.

Louis B. Stanton, being first duly sworn, on oath deposes and says: That he is of counsel for petitioner Dant & Russell, Inc.; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of the record in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the acts in said petition herein stated are true to the best of his knowledge and belief.

LOUIS B. STANTON.

Subscribed and sworn to before me this 6th day of May, 1943.

FRANK M. DAVIS,
Notary Public in and for the County of Los Angeles, State of California.

I do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari and the allegations thereof are true, as I verily believe, and in my opinion the petition is well-founded and the case is one in which the prayer of the petition should be granted by this Court.

HENRY C. ROHR,
Counsel for Petitioner.

Subscribed and sworn to before me this.....day of May, 1943.

NELLE BARBER,
Notary Public in and for the County of Los Angeles, State of California.

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Petitioner and Appellant,

vs.

BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, *et al.*,

Respondents.

PETITIONER'S OPENING BRIEF.

Application was made for a writ of mandamus to compel respondents to cancel assessments levied upon imports of Philippine mahogany. Under the circumstances alleged in the petition it is apparent that the County Assessor and Board of Supervisors exceeded their jurisdiction in levying the tax.

The Superior Court of the County of Los Angeles, to which application was made, sustained without leave to amend the general demurrer interposed by respondents. The appeal was from the judgment entered after this ruling. The trial court record thus consists of the petition and demurrer thereto.

Record in the State Courts.

Judgment was entered upon the demurrer in the trial court December 16th, 1941. The Court, in rendering its ruling, gave a written opinion which is presented in the Record, pages 12-23.

Appeal was taken to the District Court of Appeal of the State of California for the Second Appellate District. Briefs were filed therein and the case, after submission on said briefs, was decided by that court on July 21, 1942, reported in 53 Advance California Appellate, page 679.

Respondents moved for a hearing before the Supreme Court of the State of California, which was granted. The case was submitted upon the briefs on file. After submission the Court granted the Attorney General of the State the right to file a brief, of which he availed himself. There were no replies filed thereto. The Court decided the case upon the point raised in the Attorney General's brief that the Philippines were governed by the interstate commerce provisions of the Constitution. This decision was dated February 8, 1943, and reported in 21 Advance California Decisions, page 584. [R. pp. 25-27.]

Petitioner thereupon, in due time, moved for a rehearing of the last stated decision, but such motion for rehearing was denied by the Supreme Court on March 8, 1943, without opinion. [R. p. 27.]

Grounds Upon Which Jurisdiction Is Involved.

1. Petitioner, in argument on its application for the writ of mandamus, and throughout the course of the case in the state courts, specially set up and claimed the right, privilege and immunity from state taxation of its imports of lumber from the Philippine Islands into the United

States under the provisions of Article I, Section 10, Clause 2, reading as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; and the net Produce of all Duties and Imports, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

2. In its petition for the writ petitioner alleges that its property, to wit, the taxes paid, was taken without due process of law and contrary to its rights and immunities under the Fourteenth Amendment to the Constitution of the United States, in that the property involved was not part of the mass of property of the state, but was immune from such taxation under the above stated clause of the Federal Constitution.

It is accordingly believed that this case is one proper for this application for the issuance of the writ of certiorari directed from this Honorable Court to the Supreme Court of the State of California under the provisions of subdivision b. of Section 344 of Title 28, United States Code.

3. The State Supreme Court has decided a question of substance not theretofore determined by this Court, in that it has held that imports from the Philippines are subject to state taxation.

4. The State Supreme Court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court in that it has held

that the Philippines are governed by the interstate commerce clause of the Constitution in contravention of the holding of the Insular Tariff Cases.

5. There exists a direct conflict respectively among the different State Supreme Courts and the Federal Circuit Court of Appeals upon the question of when imports become a part of the property of the state so as to lose their immunity from state taxation; there is a like conflict as to the point above specified in paragraph 4.

Statement of the Case.

Petitioner in its petition for the writ alleged [R. p. 4] that in the years 1937 to 1940, inclusive, it imported various shipments of Philippine mahogany from the Philippine Islands into the Port of Long Beach. The lumber was all milled and finished in the Philippines and in that condition shipped to Long Beach where it was unloaded from the steamships and stored in piles in the yard of a warehouse.

The lumber upon which assessments were made was in the identical form as when imported. Except for the portion sold, the lumber has been retained in the same piles in place at the original point of importation. The lumber was shipped in individual pieces and not in packaged form, nor in any manner bundled together. It was stacked in piles one piece upon another. As additional shipments were received the lumber was piled in separate piles in the same yard, each shipment kept to itself.

While not alleged in the petition, the trial court and Appellate Court found that the lumber was shipped in the

customary manner usually employed by shippers, dealers and importers. The Court of Appeals in fact held that each individual piece of lumber constituted an original package of import.

The County of Los Angeles levied *ad valorum* property taxes on this lumber so stacked in the yard in Long Beach, respectively on the first Mondays of March, 1938 and 1939. In 1939 the lumber was assessed at a valuation of $7700 and the tax levied was $276.43. The next year, additional shipments having come in, the lumber so on hand was assessed at a valuation of $13,145 and the tax of $476.76 was levied. Penalties and costs brought the tax to a total of $521.20. These two amounts aggregating $797.63, were paid by petitioner in order to avoid sale of its property by the Tax Collector.

No change in ownership, form, or location was ever made as to the lumber upon which the assessments were levied from the date when unloaded from the steamship.

Respondents demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. [R. p. 11.] The argument upon demurrer confined itself to the applicability to the facts in this case of Clause 2, Section 10, Article I of the Federal Constitution. The theory of respondents was that the total shipment constituted the original package of import: a sale of a part of that shipment constituted a break of the original package; thereby, notwithstanding the segregation of the piles of imported lumber from all other property, it became a part of the general mass of the property of the state and subject to state taxation. This theory, the trial court, in sustaining the demurrer without leave to amend, necessarily upheld. [R. p. 11.]

Specification of Errors.

The trial court erred as matters of law in its ruling upon the demurrer in that:

1. It held that thousands of individual parcels of lumber shipped at one time constituted one original package contrary to the admitted averments of the pleading.

2. It held that sale of one or more individual parcels, each constituting an original package, out of a total shipment, subjected the remainder to state taxation.

3. It relied upon and based its decision on the Maine case which had expressly been disapproved as the law of California in the case of *Philippine Refining Corp. v. Contra Costa*, 24 Cal. App. (2d) 665-9.

4. It refused to give effect to the rule of *Brown v. Maryland* that the importation under the Federal law gives the right to sell the thing imported and such right cannot be forbidden.

5. It refused to give effect to the rule of *May v. New Orleans* "that a tax upon the thing imported during the time it retains its character as an import and remains the property of the importer in his warehouse in the original form or package in which it was imported, is a duty on imports within the meaning of the Constitution."

The Supreme Court of California erred as a matter of law in its ruling in that:

1. It held that the Philippine Islands, although an unincorporated territory, were domestic within the revenue clauses of the Constitution and subject to the interstate commerce clause.

2. It held that "imports within the meaning of Article I, Section 10, clause 2, refers solely to goods brought into the United States from a country entirely foreign to the United States.

3. It held that imports from the Philippine Islands, once having come to a state of rest in one of the states, are subject to state taxation and form a part of the mass of the property of the state.

Argument.

"No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

This is the emphatic wording of the clause which governs this action. Plaintiff's theory of the relation of facts to this clause is developed on the following lines:

The original package of import is no other than the individual plank as prepared for export and as received from the ship by the importer. The shield of the Federal

Constitution protects this plank from State taxation so long as its original importing owner retains its ownership unchanged in form and segregated from the general mass of the property of the State.

The importation of merchandise is essential to the maintenance of trade and commerce with foreign countries. Commerce in itself implies the right of the importer to sell the merchandise so imported. The right to sell, therefore, is connected with and a necessary and inseparable incident of the law permitting the importation. The charge or tax levied by the State in this case is a penalty inflicted upon the importer for selling the article in his character as an importer and is therefore in violation of the provisions of the Federal Constitution.

The position taken by appellant as above outlined is in accord with the views taken of the constitutional provision by the long line of interpretation thereof in the Federal Courts. It is the commonsense interpretation of the actual practice of merchants. It is the interpretation which protects and builds up commerce. It harmonizes with the views of the Constitutional Convention.

A consideration of the question requires, first, a brief review of the leading cases dealing with the scope of the constitutional provisions; second, the term "original package"; and, third, a determination of the question "when do imported goods become a part of the general mass of the property of the State." Interwoven in the subject of discussion under the import clause will also be found matters discussed under the Interstate Commerce clause; such must and will be carefully distinguished.

I.

The History and Basis of the Clause.

On the date of the Constitutional Convention the activities of commerce were centered in the northern ports of Boston, Philadelphia and New York. Here importations came after a trip of three months or more from Europe. Here they remained in great warehouses until the importers could effect sale throughout the predominantly agricultural South and the pioneer western communities.

The manner of importation and the methods adopted for distribution during the Colonial days were doubtless such as are described in *May v. New Orleans,* 44 L. Ed. 1170.

The merchant purchased that type of stock which, through long experience, he deemed he could best sell. When it arived he sent his drummers throughout a sales territory to effect sales to the local merchants. He could not safely take orders prior to arrival as the fortunes of the sea forebade such dangerous commitments. Pending sale and delivery of the merchandise the importations remained in his warehouse in one of the truly commercial states. Sales were made from these shipments from time to time as the orders therefor came in. The Colonial conditions of commerce thus bear a striking similarity to the factual situation in the case at bar.

State sovereignty was at its apogee during the period subsequent to the close of the Revolution in 1783 and prior to the adoption of the Constitution in 1789. To thinking men of that day it was apparent that a continuance of the State sovereignty idea portended the end of the Confederation. Each State each day became more jealous of its sovereign rights or threatened imposition by its co-con-

federates or by the authority of Congress. The agricultural states of the South, large in population, feeling a cavalier superiority of birth and education over the round-head northern commercial states, nevertheless were dependent upon the plebeian Yankee and Quaker for the carriage of the imports and exports upon which they relied to maintain their manorial establishments. They feared the imposition of taxes by the commercial states upon these imports and exports. It was this fear, as the debates on the adoption of the Constitution in the South demonstrate, which was the one driving force that brought about the adoption of the Constitution. The picture of the United States as of date of the adoption of the Constitution is nowhere better portrayed than in the first few chapters of McMaster's History of the People of the United States.

Proceedings of the Constitutional Convention.

Two main plans were placed before the Constitutional Convention. Consideration of these plans and their development in the convention again shows the essential needs which the Constitution filled. The New Jersey plan merely vests in Congress the right to levy duties on imports. It contained no exclusion of State action thereon. This was in harmony with the demands of the northern commercial states. They sought thereby to retain individual State sovereignty.

The other plan, the Virginia plan, was approved as the basis for the construction of the Constitution. It is, in fact, the very warp of its fabric. The Committee of the Whole modified, extended and approved it, then referred the Virginia plan to the famous Committee on Detail on

July 24, 1787. Article 13 of the report of this committee provides as follows:

> "No State, without the consent of the legislature of the United States, shall emit bills of credit, or make anything but specie a tender in payment of debts; *nor lay imposts or duties on imports;* nor keep troops or ships of war in time of peace; nor enter into any agreement or compact with another state, or with any foreign power; nor engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent as not to admit of delay until the legislature of the United States can be consulted."

After the report of the Committee on Detail, its findings were again considered by the Committee on the Whole, but short time was given to the clause in question. It evidently met the desires of all. However, that which was given is illuminative.

Martin of North Carolina, on August 16, 1787, asked what was meant in the expression "duties and imposts." If the meaning were the same, the former was unnecessary. If different, the matter ought to be made clear. James Wilson of Pennsylvania, who had drafted the report of the committee, answered him:

> "Duties are applicable to many objects to which the word 'imposts' does not relate. The latter are appropriated to commerce; the former extend to a variety of objects, as stamp duties, etc."

In debate on a motion to amend the clause and prevent the legislature from laying taxes on exports, Madison, on the same day, revealed the essential reason for the adop-

tion of the provision in his remarks, stating among other things, as follows:

> "It would be unjust to the States whose produce was exported by their neighbors to leave it subject to tax by the latter. *This was a grievance which had already filled new Hampshire, Connecticut, New Jersey, Delaware and North Carolina with loud complaints, as it related to imports,* and they would be equally authorized by taxes by the states on exports. The southern states, being most in danger and most needing naval protection, could the less complain, if the burden should be somewhat heaviest on them. We are not providing for the present moment only, and time will equalize the situation of the states in this matter."

He was for these reasons against the motion.

Mercer and Sherman both remarked that the states had now a right, where their situation permitted, to tax both the imports and exports of their uncommercial neighbors. It was enough for them to sacrifice one-half of it. The matter had been fairly adjusted and imports would be subject, and exports not, to be taxed.

At the later session of the Committee of the Whole of August 28th, Madison moved that the words "nor lay imposts or duties on imports" be transferred from Article 13 *where the consent of the general legislature may license the act,* into Article 12 *which will make the prohibition on the states absolute. He observed that as the states interested in this power, by which they could tax the imports of their neighbors passing through their markets, were a majority, they could give the consent of the legislature to the injury of New Jersey, North Carolina, etc.*

Madison further urged, in response to a suggestion that particular states might wish to encourage by impost duties certain manufacturers, that the encouragement of manufacturers in that mode requires duties, not only on imports directly from foreign countries, but from other states of the Union, which would revive all the mischiefs experienced from the want of a general government over commerce.

The motion to amend was therefore lost.

It was then moved that the words "or exports" be inserted after the word "imports" so as to prohibit the States from taxing either, which being adopted, Roger Sherman moved that after the word "exports" the words "nor with such consent but for the use of the United States" *so as to carry the proceeds of all state duties on imports or exports into the common treasury. Madison stated that he liked this motion as preventing all state imposts. Gouverneur Morris stated that he thought the regulation necessary to prevent the Atlantic states from endeavoring to tax the western states,* and promote their interest by opposing the navigation of the Mississippi, which would drive the western people into the arms of Great Britain.

On September 12th, the clause was again reconsidered at the request of Colonel Mason who urged that the restriction on the states would prevent the incidental duties necessary for the inspection and safekeeping of their produce, and be ruinous to the staple states, as he called the five southern states, and moved that the states be permitted to lay duties for the purpose of defraying charges of inspection.

Madison seconded this motion and stated as follows:

> "It would at least be harmless; and might have the good effect of restraining the states to *bona fide* duties for the purpose, as well as of authorizing explicitly such duties; though perhaps the best guard against an abuse of the power of the states on this subject was the right in the general government to regulate trade betwen state and state."

The fear was advanced that the proviso might enable Pennsylvania to tax New Jersey under the idea of inspection duties and it was further thought that there would be no security for states exporting through other states against these oppressions of the latter.

Madison stated:

> "There will be the same security as in other cases. The jurisdiction of the Supreme Court must be the source of redress. So far only had provision been made by the plan against injurious acts of the States."

His own opinion was that this was insufficient. A negative on the state laws alone could meet all the shapes which these could assume.

Dickinson further suggested that nothing will save the states in the situation of New Hampshire, New Jersey and Delaware from being oppressed by their neighbors, but requiring the assent of Congress to inspection duties.

The next day the motion was adopted.

On September 14th the final frame of the present clause was approved, "No state shall, without the consent of Congress, lay impost or duties."

The foregoing are taken from Madison's notes as rearranged in the authoritative work of Prescott entitled "Drafting the Federal Constitution."

The other great assistance in interpreting the meaning of the Constitution is found in the Federalist papers. The only instance in which the particular clause is considered in these papers is in 31 Federalist, the pertinent part of which reads as follows:

Federalist 31—State Control of Local Taxation, by Alexander Hamilton.

"As the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant. I use these terms to distinguish this last case from another which might appear to resemble it but which would, in fact, be essentially different. I mean where the exercise of a concurrent jurisdiction might be productive of occasional interference in the policy of any branch of administration but would not imply any direct contradiction or repugnancy in point of constitutional authority. These three cases of exclusive jurisdiction in the federal government may be exemplified by the following instances: The last clause but one of the 8th section of the 1st article provides

expressly that Congress shall exercise 'exclusive jurisdiction over the district to be appropriated as the seat of government.' This answers to the first case. The first clause of the same section empowers Congress 'to lay and collect taxes, duties, imposts and excises' and the second clause of the 10th section of the same article declares that 'no State shall, without the consent of Congress, lay any imposts or duties on imports or exports except for the purpose of executing its inspection laws.' Hence would result an exclusive power in the Union to lay duties on imports and exports without the particular exception mentioned but this power is abridged by another clause which declares that no tax or duty shall be laid on articles exported from any State; in consequence of which qualification it now extends to the duties on imports. This answers to the second case. The third will be found in that clause which declares that Congress shall have power to establish a uniform rule of naturalization throughout the United States. This must necessarily be exclusive because if each State had power to prescribe a distinct rule, there could not be a uniform rule."

A ban upon the taxation of imports by any State under any and all circumstances was the clear thought in the minds of the drafters of this then vital clause of the Constitution. The factual setting under which the convention met, the vital State interests at stake, the unanimity of opinion, the meticulous structure of the clause itself, all indicate a clear and unanimous meeting of the minds. No clause is more carefully drawn, possessed of the checks here found, nor put in more positive language. By no legal legerdemain, under the guise of no loop-hole, was any State to be permitted to tax imports.

The mercantile customs then present were known and taken as a matter of course by the convention. Certainly, a merchant imported at his own risk a shipload of various merchandise from England or the West Indies. Certainly, he sold a part of that shipment in Virginia, retained a part in his Philadelphia warehouse and sent another part to his factors in Charleston. That usual mercantile conduct was not to permit any one of those states involved to levy its local taxes under any guise on such imports and hence raise the cost thereof until title passed from the importer. Wilson stated this was to prevent taxes of a commercial nature or of any other nature such as stamp duties, etc. The protection is absolute.

II.

The Scope of the Constitutional Provision Is Determined by the Supreme Court in Three Great Decisions.

The greatest exposition of the meaning of the terms which constitute the clause in question was given in the decision of Chief Justice Marshall, made in 1827, in the case of:

> *Brown v. Maryland*, 12 Wheaton 419, 6 L. Ed. 678.

This decision covers the whole field, initiates the original package doctrine, explains the basic reason for the adoption of the constitutional provision and applies this reasoning concretely to the various questions involved or which may arise thereunder. The case is in itself a brief for appellant's viewpoint. Maryland required importers to take out a license before they could sell any merchandise. The plaintiffs in error imported and sold one package of

foreign drygoods without such license. The Maryland Court found them guilty. The Court stated that the cause depended entirely on the question whether the state legislature could require the license before the importer was permitted to sell a package so imported.

First the inquiry was directed to the meaning of the word "imposts" and the Court gave the answer that an impost or duty on imports is a custom or a tax levied on articles brought into a country. It is, however, no less an impost if it be levied after the landing.

The question was then placed: What are imports? And the answer was given:

> "They are the articles themselves which are brought into the country."

A duty on imports then is not merely a duty on the act of importation, *but is a duty on the thing imported.* It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country.

In view of the theory of the respondents, it is highly important at this point to observe that the Court differentiates between the total shipment imported and the article imported. The decision clearly states that it is not the total shipment or act of importation which is protected, but it is the article itself which may be a component part of that shipment to which the protection is given.

It must be remembered that Justice Marshall, prior to the revolution, was an important political figure in the Virginia House of Burgesses. During the revolution he was one of the trusted aides of George Washington. Subsequent to the revolution he held highly important posi-

tions in the government of the United States before his appointment to the position of Chief Justice. His exposition, therefore, of the need for this provision and of the condition of the states as set forth in this decision is of the utmost importance as casting an authoritative light upon the questions which, as we have above noted, were dealt with in the Constitutional Convention. His conclusion from the argument set forth by him is as follows:

> "A duty on imports is a tax on the article which is paid by the consumer. The great importing states would thus levy a tax on the non-importing states which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports."

It was for the vital reason, as he points out, that this would bring about countervailing measures which would lead to disruption of the whole commercial fabric of the Union.

The State of Maryland then raised almost precisely the question which is here raised, and claimed that the shipment or point of time of entering the country is the point of time where prohibition ceases and the power of the State to tax commences. The answer to that was given that this could not be admitted; in fact such construction would in itself defeat the prohibition. *There must be an affirmative act on the part of the importer whereby he has himself incorporated the article imported with the mass of the property of the State, but while that article remains the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition of the Constitution.*

The Court then proceeds to state that the object of importation is sale. This constitutes the motive for paying the duties. By the payment of such duties the United States confers the right to sell as the consideration for which the duty is paid. It is a power which reaches into the interior of a state and there authorizes the sale of those articles which it permits to be introduced. In fact, sale is the object of importation and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing as the importation itself. Congress, therefore, has the right, not only to authorize importation, but to authorize the importer to sell.

The Constitution has not confided this subject to the common sense of the states, but has reserved the power to permit taxation on imports to the Congress itself, and any tax or charge on the introduction or incorporation of articles into and with the mass of the property of the country is hostile to power given to Congress to regulate commerce since an essential part of that regulation and the principal object of it is to prescribe the regular means for accomplishing that introduction and incorporation. Therefore, the decision of the Maryland Court was reversed.

The various State governments bowed to this decision without hesitation. Then came the case of:

May v. New Orleans, 178 U. S. 496, 44 L. Ed. 1165.

This case was decided by Justice Harlan in 1900. The plaintiff was in the business of importing European goods and selling these goods as a wholesaler. The foreign manufacturer made his package of the goods to be shipped,

then delivered various packages to the carrier for transportation. The carrier incorporated several of the manufacturer's packages into one larger package for convenience in carriage. When the shipment arrived at New Orleans, plaintiff broke up certain of the carrier's packages and placed the goods on his shelves in the original manufacturer's packages. The State assessed said property on the merchant's shelves for taxation. The action was one to enjoin levy of the assessment and the principal question was that which constituted the original package, whether that put up by the manufacturer or that put up by the carrier. The Court, construing the case of *Brown v. Maryland,* held as follows:

> "The payment of duties to the United States gives the right to sell the thing imported and such right to sell cannot be forbidden the importer by the State.
>
> "A tax upon the thing imported during the time it retains its character as an import and remains the property of the importer in his warehouse, in the original form or package in which it was imported, is a duty on imports within the meaning of the Constitution.
>
> "A state cannot, in the form of a license or otherwise, tax the right of the importer to sell, but when the importer has so acted upon the goods imported that they have become incorporated or mixed with the general mass of the property in the state, such goods have then lost their distinctive character as imports and have become, from that time, subject to state taxation, not because they are products of other countries but because they are property within the state in like condition with other property that should contribute in the way of taxation to the support of the government which protects the owner in his person and estate."

It is to be remembered that in this case there was a general shipment constituting a number of packages received from the carrier. This general shipment was received in the plaintiff's store and the plaintiff stripped some of the carrier's packages and retained the individual original packages as made by the manufacturer.

The Court held that the original package must be the box or case in which the goods imported were shipped and when this was opened for the sale or delivery of the separate parcels contained therein, each parcel lost its distinctive character as an import and became property subject to taxation by the State.

The importer himself, by the opening and breaking of the parcel or unit of import, evidenced the intent upon his part to incorporate the imported goods with the general mass of the State's property.

The last case which it is desired specifically to call to the Court's attention under this heading is that of

Anglo-Chilean Nitrate v. Alabama, 288 U. S. 224, 77 L. Ed. 710.

In this case plaintiff did an exclusive business of importing nitrate from Chile. A tax was levied by Alabama on the capital employed. The Court held that inasmuch as the plaintiff did no local business in the state this was, in effect, an assumption of the power to tax appellant's sales in original packages of the nitrates it imported. The holding on the decision was that the Alabama law was unconstitutional under the provisions of the section invoked herein, and the Court there stated:

> "The right to import the nitrate included the right to sell it in the original bags while it remained the property of appellant and before it lost its distinctive

character as an import. The State prohibition on such sales would take from appellant the very rights in respect to importation that are conferred by the Constitution and laws of the United States. Alabama was powerless without the consent of Congress to tax the nitrate before such sales or to require appellant by the payment of an occupation or franchise tax, or otherwise, to purchase from it the privilege of selling goods so imported and handled."

Again it will be noted that the Court placed the right to sell in the original bags of import, not in the total shipment of import.

Appellant in this case was in much the situation of the appellant in the nitrate case. In the nitrate case it is true Alabama levied a tax on the capital employed. Here California attempts to levy a tax upon the capital employed by its levy upon the stock of lumber on hand. California could not reach the appellant in this case because appellant never established an office in California. It seeks by indirection to evade the decision of the nitrate case by levying upon the shipments constituting the capital employed by appellant in its exclusive business of importing lumber.

The conclusion to be drawn from the foregoing illuminative cases is that the American merchant, under the Constitution, has the right to import into a state goods for sale in that state. The goods are imported in commerce and commerce implies the right to sell. The sale of any one of the individual packages of import as received from the importing carrier is a sale under the constitutional provision. The remainder of the shipment is protected under the constitutional provision so long as the importer retains such remainder of shipments in the origi-

nal form, segregated from the general mass of property of the state. Congress itself is the sole authority which can permit taxation upon such shipments and even under such permission all moneys realized from such taxation must be covered into the treasury of the United States, and not into the state treasury.

III.

The Protection From State Taxation or Interference Under the Interstate Commerce Clause Inheres to the Article of the Shipment in Its Original Package.

Consideration under this head requires, first, an examination of the term "original package"; second, the differentiation which exists between the exemption from taxation under the import clause from that under the interstate commerce clause; and third, the requirement as to imports that before they become liable for taxation there be an affirmative act on the part of the importer waiving the exemption and actually mingling the importation with the mass of properties of the state. The California cases dealing with the subject will, for the purpose of convenience, be treated under a separate subheading.

1. The Various Individual Articles or Units Comprising the Shipment Are the Original Paackages of Import.

The term "original package" was first brought into the language of the law in *Brown v. Maryland, supra.* There has been a clarification of the term. Perhaps the best evidence is found in 15 *Corpus Juris Secundum* 28, page 310:

> "The original package as applied to interstate and international commerce is a package, bundle or aggre-

> gation of goods put up in whatever form, covering or receptacle for transportation, and as a unit transported from one state or nation to another. It is the identical package delivered by the consignor to the carrier at the initial point of shipment in the exact condition in which it was shipped."

This does not require that there be any envelope or binding so as to enclose the article in a package. The original package delivered by the consignor may be incapable of any such confinement or binding together with other articles. In the case of livestock transported by the carload, it has been held that it is the individual animal which constitutes the original package, and not the car.

State v. Winters, 44 Kan. 728;
People v. Wemple, 131 N. Y. 64, 27 Am. St. R. 542, Anno. p. 54;
State v. Parsons, 124 Mo. 436, 46 Am. St. R. 547;
United States v. 65 Casks, 170 Fed. 449.

The last cited case contains one of the most lucid expositions of the point at issue which can be found. It considers the point as to whether the original package consists of a shipment or of the individual article. Here there was a carload shipment of 65 casks of liquid extract. The government, in a drug-misbranding case, claimed that the original package was the car which contained the 65 casks. The owner of the shipment, on the other hand, contended that each cask constituted an individual article of import in interstate commerce. The Court held with the owner and was subsequently upheld by the Circuit Court of Appeals. The opinion states:

> "It seems to be clear that in this case the cask is the original package for the very simple reason that the

> car was wholly incompetent to package the liquid itself. The cask was a complete entity of itself, not connected or bound up with any other article, but capable of and, in fact, containing some fifty gallons of this liquid, an amount capable thereby of being safely and conveniently handled and transported. Each cask was marked to the consignee and if separated from the car was capable of shipment independent thereof without either loss or inconvenience."

A similar conclusion was reached as to sacks of flour shipped in carload lots.

Lassater v. Purcell, 22 Tex. Civ. App. 33, 54 S. W. 425.

The question of the constitution of the original package has been nowhere more clearly considered than in the various license cases and cases dealing with the right to import such things as liquors, tobacco and oleo-margarine into states prohibiting retail sale thereof.

Leisy v. Hardin, 135 U. S. 100, 34 L. Ed. 128.

In this case the City Marshal of Keokuk, Iowa, levied upon 122 quarter barrels of beer, 171 eighth barrels of beer and eleven cases. The defendant contended that these were importations in the original package and did not become a part of the common mass of the property of the state so long as they remained in the original casks. This was upheld.

A review of the various cases along this line was diligently made by the Supreme Court in the case of

Austin v. Tennessee, 179 U. S. 343, 45 L. Ed. 224.

In this case, packages of cigarettes, ten in a package, were imported into Tennessee and the claim was made

that these were, in fact, the original packages of import and the state of Tennessee had no right to seize them. There had grown up a considerable business in the manufacture of original packages for the purpose of evading the laws of the different states. After the consideration which the Court gave to the matter, a termination was made to the business of the original package manufacturer. The Court stated:

> "The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the *property is imported in the ordinary form in which from time immemorial foreign goods have been brought into the country.* These have gone at once into the hands of the wholesale dealers who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the state. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up."

May v. New Orleans, 44 L. Ed. 1165.

This case sums up and practically determines the original package definition. The facts were that the shipment concerned comprised various packages from different manufacturers. Some of the shipment was on account of import orders received from customers, the remainder upon the firm's own account. The stock of the former consisted of bobinet, linens, dolls, toys, sheets, embroideries and laces procured from different manufacturers. The individual manufacturer put up his goods in individual packages. Then, when delivered to the carrier, a number of such packages received from the manufacturer was combined to constitute a package for handling by the

carrier. Apparently such packages from the carrier might be constituted of original packages from different European manufacturers. Several of these carrier packages might come in one shipment. Upon receipt of the shipment, May & Co. broke certain of the carrier's packages and delivered to customers or placed upon their shelves the individual manufacturer's packages. They were careful not to break the original manufacturer's packages. The question then placed was as to that which constituted the original package exempt from taxation under the constitutional provision. No question was raised as to the total shipment constituting an original package, but it was limited to whether the original package was that of the carrier or of the manufacturer. In defining the original package, the Court held as follows:

> "In our judgment, the *original package* in the present case *was the box or case in which the goods imported were shipped*, and when the box or case was open for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits."

The rule to be adduced from these cases, then, is that the original package is that article of property which is imported in the ordinary custom of business from the foreign country, whether it be wrapped or whether it be the identical article such as a log or piece of timber, or whether it be a number of articles enclosed in some box or case, provided it be in the ordinary form which in mercantile custom such goods are handled. The Court would take judicial notice of the fact that lumber is handled in the

individual plank or board. It is never bundled or wrapped together. In fact, it is sold by board measure.

The obverse of the import situation is found in the cases dealing with the prohibition upon taxation of exports. This follows the same rule as that which has been more clearly defined on the import.

Champlain v. Brattleboro, 260 U. S. 366, 67 L. Ed. 309.

In this case plaintiff cut pulp wood in four different towns in Vermont to be floated down the Connecticut River to Brattleboro. It began its shipments on March 25th and made various shipments during the week thereafter. The Court held that these various shipments were each and all in transit and exempt.

Multnomah v. Dant & R., 158 Ore. 350.

In this case lumber was gathered from various interior points for export from the United States. It was held to be exempt from taxation.

Practically and reasonably the original package must be something that the ordinary importer, merchant and business man can readily apprehend. It may not be a recondite conception perceptible only to the legal mind. The people make the law; but the law never made even one person. The statement that a carload or shipload of lumber constitutes one original package refutes itself to the man of business. The clear basis of petitioner's case rests upon the definite and apparent fact that each plank, board, or timber is the unit of import, carriage and commerce. The single log, timber or plank is ordinarily and commonly dealt with and handled as a unit by the practical

lumberman, carrier and builder, as well as by the law dealing therewith.

The District Court of Appeal took judicial notice that under the law of California it was the individual piece of lumber that constituted the unit of commerce, or original package. This was in harmony with the code provision in California (Public Resources Code, Chapter 6, Division 4, and Penal Code, Section 356) and with the statutes of many of the lumber producing states. Under these provisions a scheme for marking or branding the individual parcel of lumber is provided. A log or parcel so treated and bearing the mark of the party entitled thereto presumptively is the property of the owner of the mark or brand. It is common knowledge that the usual mode of handling, shipping and storing lumber is by the individual piece or parcel.

2. There Is a Differentiation Between the Exemption From Taxation Under the Import Clause and That Under the Interstate Commerce Clause.

Many of the cases that have been cited for the purpose of defining the original package arose under the interstate commerce clause. While it is quite true that reference may be made to such cases for definition of the original package, the findings of those cases as to the right of taxation upon the article coming to rest must be carefully differentiated from the findings of cases resting upon the import clause. The import clause is found in Section 10 which consists of prohibitions in no uncertain terms upon the rights of the state to do certain things, whereas the interstate commerce clause is found in Section 8 which gives power to Congress to regulate commerce. There is

no prohibition in Section 8 as against state action and the uniform rule has been that until Congress has acted the states are at liberty to act. This differentiation has been carefully drawn, particularly with respect to the taxation feature on goods in interstate commerce and under foreign importation.

Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382.

In this case plaintiff sold goods in the original packages brought into Alabama from other states of the Union and claimed that he was not liable to taxes imposed upon sales of merchandise under the import clause. The Court reviewed the condition of the confederation and the debates in the convention. Its holding, however, was that goods imported from one state into another were not within the prohibition of the states to levy taxes upon imports. The only prohibition upon the state was that its taxes should not discriminate injuriously against the products of other states. The leading case upon this point is that of:

American Steel & Wire v. Speed, 192 U. S. 500, 48 L. ed. 538.

"Assuming that the goods concerning which the State taxes in this case were levied were in the original packages and had not been sold, *if the bringing of the goods into Tennessee from another state constituted an importation in the Constitutional significance of that word, it is clear that they could not be directly or indirectly taxed*, but the goods not having been brought from abroad they were not imported in the legal sense and were subject to state taxation after they had reached their destination and whilst held in the state for sale."

These cases concerning the distinction between the importations from foreign countries and the goods received from other states of the Union were carefully reviewed, and the importer from foreign lands differentiated from the merchant trading interstate in the recent case of:

> *Sonneborn v. Keeling,* 262 U. S. 505, 67 L. ed. 1095.

In this case the plaintiffs imported oil from New York into Texas and there placed it in warehouses and made sales in the original packages of transportation. The state levied a tax on the gross amount collected from sales, which the plaintiff objected to paying. The oil came to rest in the warehouse and the interstate transportation was at an end. The Court held:

> "Cases subsequent to Brown v. Maryland show that the analogy between imports and articles in original packages in interstate commerce with respect to immunity from taxation, fails. *The distinction is that the immunity attaches to the import itself before sale,* while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce."

The Court held, in effect, in accordance with the *American v. Speed* case, that when the goods in interstate commerce had once come to rest in the state and thereby were taken out of the channels of interstate commerce, they became subject to state taxation.

The distinction which has been drawn between the importations from foreign countries and the articles in interstate commerce emphasizes the position taken by plaintiff in this case that the *immunity of the Constitution covering*

imports is positive and covers the individual article of import up to the very point when it is sold by the importer or, by affirmative act of the importer such as the breaking of the original package, mingled with the mass of the property of the community. In the article imported in interstate commerce, as soon as the article has ceased its interstate transportation, it thereby becomes mingled with the property of the state in which it has come to rest and is subject to taxation. The shipments set forth in the case of interstate commerce embrace a number of articles. There the article itself is given emphasis as the unit upon which taxation may be placed, not the shipment. It emphasizes the fact that it is the article itself which is the subject of importation which is the unit protected from local taxation. The differentiation which has been drawn between the articles in interstate commerce and articles in foreign commerce constitutes, from a reasonable standpoint, one of the strongest arguments in favor of the position of plaintiff herein.

3. **Before Imports May Become Subject to State Taxation, There Must Be Some Affirmative Act Upon the Part of the Importer Which Actually Mingles the Importation With the Mass of the Property of the State and Thereby Waives the Exemption.**

In the natural course of events no case would arise when the importer has purposely transferred goods from the status of an import to status as a part of the mass of State property. In such case no claim of exemption would be made. The cases involve invariably the waiver by the importer of the Constitutional right. Hence, at the outset of this division, it is well to consider the elements of a waiver.

THE DOCTRINE OF WAIVER.

McDaniels v. General Ins., 1 Cal. App. (2d) 454-60.

> "To constitute a waiver there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege—an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded or insisted upon. In no case will a waiver be presumed or inflicted contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been mislead, to his prejudice, into the honest belief that such waiver was intended or consented to."

The foregoing is one comprehensive delineation of the doctrine. An example of the requirement of an affirmative act of waiver of a constitutional right is found in:

People v. Ventura, 204 Cal. 286-96.

This was an action by the State to recover the two-cent a gallon license tax on gasoline sales made by purchasers from the refining company. In the contracts there was an increase in price of two cents per gallon over the then prevailing price. The Court reversed the lower court in holding that the refiner had waived its right to rely upon its exemption by collecting the equivalent of the tax from the public.

Apply this definition to the case at bar. There is the existent constitutional right; appellant unquestionably knew thereof. In fact, it took all reasonable means to

avail itself thereof. It kept the imports in the identical piles as placed from the ship; in the identical condition as delivered to the carrier by the exporter, with the exception of sales made exclusively outside of California. In every respect it unquestionably intended to keep the importation as imports unmingled with the mass of property.

Essentially the County must claim that appellant, by some affirmative act, intended to and did waive this constitutional immunity from taxation. It is, indeed, a marvelous stretch of the legal imagination to conceive of the idea that by one or more sales made outside of the State, appellant intended these goods, which otherwise would admittedly have remained exempt from taxation, to become mingled with the mass of the property of the State of California. Yet, intention to waive a right is an essential element of waiver.

First Nat'l Bank v. Maxwell, 123 Cal. 360-8;

Alden v. Mayfield, 164 Cal. 6-11;

Wienke v. Smith, 179 Cal. 220-6.

True waiver may be established by some act done or omission to act, either of which signifies the intention of the party. But in order to have this effect, the claimed act or omission must be, in itself, inconsistent with the intention to claim the immunity.

Aronson v. Frankfort, 9 Cal. App. 473-80;

67 *Corpus Juris.* 311.

"When the only proof of intention rests in what a party does or forbears to do, his acts or omissions to act relied upon should be so manifestly consistent

with, and indicative of an intent to, voluntarily relinquish a then known particular right or benefit that no other reasonable explanation of his conduct is possible."

Under the clear fact in this case appellant showed itself meticulously careful to avoid even the appearance of a waiver of its constitutional rights, much less manifesting any intention so to do.

4. Sales of Portions of the Shipment Leaving Intact the Remainder in Their Original Packages of Import Do Not Constitute a Waiver of the Constitutional Exemption.

State v. Board of Assessors, 46 La. A. 145, 49 Am. St. R. 318.

In this case the relators were importers of foreign goods. On the tax day they had in stock $15,000 worth of imported goods of which $1,000 worth was in broken packages. Goods are held subject to such sales as can be made throughout the year. New Orleans defended on the ground that the relators had by so offering the goods for sale, and selling, caused their property to become mingled with the mass of property of the State. The Court held against this contention, as follows:

"The fact that these goods are for sale in the store does not change their ownership nor necessarily have the effect of mingling them with other goods that are not in packages. The immunity from payment of taxes follows the goods without reference to the place in which they are stored. That they are offered for

sale in unbroken packages in the importer's store is not in effect a breaking of the packages, or such a disposition of the goods as causes the immunity from the tax to end."

Mexican v. Louisiana, 172 La. 604.

In this case oil was imported into the State from Mexico, pumped from the tank steamer into tanks on shore in which there was a considerable portion of oil theretofore imported. Sales were made from these tanks. It was held, after reviewing the case of *Mexican Petroleum v. Portland,* 121 Me. 128, that the doctrine there advanced to the effect that the tank steamer was the original package was incorrect and the importations of oil were held non-taxable. A similar holding was made in:

Galveston v. Mexican Petroleum, 15 Fed. (2d) 208.

Various goods imported from foreign countries were held in their original packages of import. One assessment made thereon was held invalid; it was further held that the fact that these goods were held subject to sale was wholly immaterial, in

Appeal of Pitkin, 193 Ill. 268.

That a portion of the shipment of imported goods had been or were to be sold was, on the question of the right to tax, held wholly immaterial in the case of:

City of Detroit v. Paper Company, 202 Mich. 22-26.

5. The Breaking of Bulk and Placing the Shipment in Bags or Bins Does Not Constitute a Waiver of the Constitutional Exemption.

In re Texas, 32 Hawaii 431.

In this case importation of phosphate rock was made into Hawaii in sacks. The rock was taken from the sacks and placed in bins. Exemption was claimed on this import from Chile. The Territory claimed the rock had become mixed with the mass of goods. The Court held that so long as the rock remained segregated in the hands of the original importer it was exempt.

Philadelphia & Reading v. Pennsylvania, 82 U. S. 284; 82 L. ed. 164-8.

"If the States may tax at pleasure imported goods, so soon as the importer has broken the original packages and made the first sale, it is obvious the tax will obstruct importation quite as much as would an equal impost upon the unbroken packages before they have gone into the markets, and this is so, though no discrimination is made."

McGoldrick v. Gulf Oil, 309 U. S. 423, 84 L. ed. 840.

In this case fuel oil was imported to a bonded warehouse in New York and then sold and delivered as ships stores. New York levied its sales tax. While this case rests upon the draw-back feature of the customs laws, nevertheless it is of importance to consider, as here, the exemption from State taxation was placed upon the other exclusive right of the Federal Government to regulate foreign commerce. The tax was held invalid.

Chief Justice Taney, as Attorney General for Maryland, argued the cause of *Brown v. Maryland* for the state.

He became convinced of the basic truth of Justice Marshall's opinion. He wrote himself a great opinion which is an effective summary of the position of appellants on this branch of the case. The deciding portion is quoted.

License Cases, 5 How. 504-74, 12 L. ed. 256-88.

"Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as part of the mass of the property in the State usually taxed for the support of the State government. . . . And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely in transit and on their way to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for State purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through a State. A tax in any shape upon imports is a tax upon the consumer, by enhancing the price of the commodity. And if a State is permitted to lay it in any form, it will put it in the power of a maritime importing state to raise a revenue for the support of its own government from citizens of other states, as certainly and effectually as if the tax were laid openly and without disguise as a duty on imports. Such a power in a State would defeat one of the principal objects of forming and adopting the Constitution."

6. California Cases Have Uniformly Declared the State Taxation Invalid Under the Constitutional Provision.

The California cases bearing upon the question involved, for the convenience of the Court, have been segregated under this one head, although they run the gamut of the argument above stated.

First there are two cases in which the Supreme Court of the State was corrected by this Court and second, there are four Appellate Court decisions, not including the decision in the case at bar.

Almy v. People, 65 U. S. 169, 16 L. ed. 644.

The legislature levied a stamp tax on all bills of lading on exports from California of gold or silver. Plaintiff received gold dust for transportation to New York, for which he signed an unstamped bill of lading. He was indicted for a misdemeanor. His conviction was reversed. Justice Taney who appeared for Maryland in the case of *Brown v. Maryland* held that the tax differed only in form from a duty on the article shipped and therefore was unconstitutional.

Low v. Austin, 80 U. S. 29, 20 L. ed. 517.

Plaintiffs were importers of French champagne which they stored in their warehouse in the original cases subject to sale. The assessor levied the usual county taxes thereon, not as imports, but as part of the mass of the property of the State. Justice Field, in his opinion, pointed out the error of the California Court and stated:

> "The goods imported do not lose their character as imports and become incorporated into the mass of the property of the State until they have passed from the

control of the importer or have been broken up by him from their original cases. While retaining their character as imports the tax upon them in any shape is within the constitutional prohibition."

7. California Appellate Court Cases.

The first two Appellate Court cases evidently involved the same situation, the tax being levied respectively by the City of Calexico and by the County of Imperial. These cases are entitled:

Imperial Development Co. v. Calexico, 47 Cal. App. 666;

Imperial Development Co. v. Imperial County, 47 Cal. App. 794.

On the tax date plaintiff was the owner in possession in the City of Calexico of 349 bales of cotton and 14 bales of bolles in unbroken original packages, that is to say, flat bales. The cotton was stored in the compress company's yards, but not at any one place, although marked for identification. Evidently it was imported at different times and it was at all times open for sale. Sales were made of different parcels subsequent to the tax date.

The Court held that it was entirely immaterial that the flat bales were not suitable for long transportation. The material point was that the cotton was in its original package as imported. It was only when it was charged in form by compression that it might become liable to tax.

It also made no difference that it was assembled and stored at different dates, the Court in this respect saying:

"The relevancy of these matters is not apparent to us. *If the rule would be applicable to 349 bales of cotton considered as one lot, it will be applicable*

> *to one bale.* Therefore, if each bale was stored in a different warehouse or in a different part of the same warehouse, and if each bale had been brought to the warehouse at a different time, the principle would be none the less applicable for it is admitted that the goods were marked for identification and were in the original packages. Under such circumstances it could not become so mingled with the other goods stored in the warehouse as to lose its character as an import while it continued to be the property of the importer."

The Court also held that it made no difference that the cotton was on the free list, just as in the case at bar. In that respect the Court stated that if the permission of the United States to import the articles is given, the permission is equally as efficacious when given without payment of a special tax or duty.

Philippine Refining Corp. v. County of Contra Costa, 24 Cal. App. (2d) 665.

In this case the County of Contra Costa levied local taxation on imports of cocoanut oil which plaintiff had imported from the Philippines under contracts of sale with various customers. It is apparent from reading the decision that the oil was stored in tanks at Point Pablo as a result of various importations. In fact, it is stated that plaintiff had on hand a quantity of oil imported on four steamers. Deliveries were made to various purchasers, only ten per cent of whom were within California. Exemption was claimed under both the import clause and

the interstate commerce clause. The decision was evidently made on the import clause. The decision relies on the following cases:

Carson Petroleum v. Vail, 279 U. S. 95, 73 L. ed. 626;

Galveston v. Mexican Petroleum, 15 Fed. (2d) 208;

In re Texas, 32 Hawaii 431.

It is interesting in this respect to note that the *Galveston v. Mexican Petroleum Corporation* distinguished the case of *Mexican Petroleum Corporation v. City of Portland* wherein the Supreme Court of Maine held that the tank steamer was the original package or container.

The Court here relied upon the tenet of the Federal Circuit Court of Appeals case; the *Maine* case was thus placed under the ban of California law; this is settled in the Appellate Court decision of the case at bar.

The Court in the *Contra Costa* tax case placed strong reliance upon the export case of *Carson v. Vail.* In that case orders from foreign buyers were obtained and then oil purchased in Kansas, Oklahoma and Texas and transported in tank cars to Louisiana where it was stored awaiting shipment. No segregation of the oil was made and no assignment to any particular shipment, the holding being that regardless of the particular shipment in the particular tank car, the goods or articles themselves came under the protection of the exclusive power of the United States to regulate foreign commerce.

Unquestionably the conclusion may be drawn from this case that regardless of the particular shipments, it is the article which carries the exemption.

Johnson v. County of Los Angeles, 31 Cal. App. (2d) 579.

While this case turned rather on the question of the ownership of the property, it is a logical inference from the facts stated that the goods upon which the County sought to levy tax were an aggregation of several imports, as it is stated that during the months of June and July in 1934, and July, 1935, there were deposited in the warehouse of plaintiff twine, rope and cordage imported from the Philippine Islands.

IV.

Analysis of Facts and Law Establishes That It Was and Is the Article of Import Which Required and Was Given Protection.

The merchant of Revolutionary days did business in a decidedly different way from the merchant of today. America was then predominantly agricultural. Manufactured goods of the better quality were all imported by the two or three commercial states. The possible markets of the merchant required him to combine in his one shipment diverse articles assembled from various European manufacturers. There was then no shipload of oil, lumber, iron or other commodity. One shipment would include such diverse articles as books, linens, furniture, bricks and wine. It was an arduous voyage in the sailing ship of those times, sometimes of a stormy three months or more duration. The goods comprising the shipment

must be carefully and strongly bound in bales or boxes and well stowed, else they would suffer damage in the tossing of the small ship of that day or by waves breaking over the decks; the ship itself would be endangered through the shifting of cargo. The shipment was required to be well packaged to stand the perils of the sea. This packaging was generally done by the export carrier. It was, therefore, reasonable for the Court to hold that it was the package as prepared by the carrier or exporter for shipment that is the unit, the article of import which is given the constitutional protection.

An importation is made by a Boston merchant in a Boston ship. It is landed in Boston and then placed in his warehouse. The goods are adapted for the type of consumer found only among the planters of Virginia or the Carolinas. Massachusetts Bay Colony had always been a self-satisfied community with good reason. It had built up its commerce out of its own foresight and hard labor. It had as little love for the easy-living southerner as the southerner had for the Yankee merchant. Why should not their goods on hand in the warehouse be taxed for the benefit of the New England community. True, such tax would add to the cost of the Old Dominion purchaser, but that should be no concern to Boston. True, some of the articles of import had moved south on the small coast-wise vessel which was in harbor when the European shipment arrived and would thus escape the tax. The price of the delivered goods would thereby vary as to whether or not they paid the Boston tax. This would and did increase the dissatisfaction of the southern customer. But this was a matter of small importance until he began to deal directly with

English merchants and beseech them to make direct shipments to southern ports.

Such was the condition of commerce during the Confederation. State taxation of the article of import was bringing about the disruption of the Confederation. It was about to throw the southern states into the arms of England. England was the great consumer of the tobacco raised in the South; it was the great source of importations to the South. The idea of the total abolition of the right of the State of import to tax the article of import was initiated in the South. The commercial North appreciated the apparent danger from an obstinate insistence upon this right. Hence, the clause passed through the Convention with unanimity. It is significant herein that the changes which were made during the course of the Convention were to tighten and strengthen the original clause so as to eliminate all possible claim by the state of import to the exertion of its right to tax. It was and is the article of import which was given the constitutional protection.

The great opinions outlining the scope of the clause deal in their very verbiage with the article of import.

In *Brown v. Maryland, supra*, an importation had been made. One article from the shipment was sold. This, Maryland deemed a violation of its laws and convicted. Justice Marshall in his decision nicely separated the total articles comprising the shipment from the sale of one article. He carefully elaborated the rule that the right to import is governed by Congressional Act. Once again, such right includes as an inseparable incident, the right to sell any article of the shipment. In this respect he definitely held that the right to sell an article of import

did not admit of the taxation by the State of the remainder of the shipment.

> "Any penalty inflicted on the importer for selling *the article* in his character of importer, must be in opposition to the Act of Congress which authorizes importation. Any charge on the introduction and incorporation of *the articles* into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation."

In *May v. New Orleans* the case dealt only with an assessment on "merchandise and stock in trade" in the total valuation of $2,500. It is reasonable to assume that the total stock in trade of a merchant doing the size and class of business described in the opinion was far larger than such an amount. The assessment was made upon the goods in question because only those goods had been broken out of the original packages of shipment. Evidently in the usual course of business they were parts of several shipments. Emphatically does this case term the original package the article as usually carried in commerce, which is the article protected by the clause.

The very essence of the opinion in *Anglo-Chilean Nitrate v. Alabama* leads to the same conclusion. Here is a company engaged exclusively in the importation and domestic sale of foreign goods. It was held that a tax on the capital employed was in effect a tax on the sales and hence violated the constitutional provision. But this could not be true if one sale out of a total shipment would cause the whole shipment to become a part of the

mass of goods of the State. Let us assume that a shipment of nitrate from Chile to the value of $50,000 is made. The company, under the view of the decision, has $50,000 capital in Alabama, entirely employed in this foreign merchandise. But out of this total shipment one bag is sold for $10.00, another for $10.00 and another. Immediately upon these sales, if the total shipment thereby becomes a part of the mass of the property of the State, the capital so employed is employed not in foreign imports but is employed in domestic affairs within the State; necessarily, the State is entitled to tax it. The Court accordingly held:

> "The right to import the nitrate included the right to sell it in the original bags while it remained the property of appellant and before it lost its distinctive character as an import . . Alabama was powerless, without the consent of Congress, to tax the nitrate before such sales or to require appellant by the payment of occupation or franchise tax, *or otherwise,* to purchase from it the privilege of selling goods so imported and so handled."

From a study of these three leading cases the rule is clear that it is the article of import which receives the constitutional protection.

An appreciation of the intent and points really at issue and determined in the other cases on this question lead to the same inevitable conclusion. They but delineate the individual details; they but etch more deeply the outstanding basic principles of the three leading cases. It is not the shipload of oil, the train-load of steel, or even the carload of casks or paper which is relevant. It is the article which ordinary commercial usage has adopted

as the unit of import; it is the article itself as prepared for export by the exporter or carrier and delivered to the importer that alone is relevant to a determination of right to exemption from local taxation. The sale of one article imported does not and cannot affect the immunity of one or more of the other articles. It is the individual article of import which has received constant protection.

In reason and commercial usage it must be the article of import, not the shipment, which is protected. In the case at bar the lumber imported chanced to be all Philippine mahogany; possibly all from one exporter. But this is only a chance. There is no reason why this importer might not have assembled for shipment in Manila a dozen different hardwoods from a dozen different countries in the East and brought them all in one shipment. He then naturally would have piled them in different stacks. Some such as teak, rosewood or ironwood, would naturally move into commerce more slowly than others. Can it be said that he should be penalized by a tax on the teak or rosewood because he makes a sale of one of the woods of lesser value.

When the merchant takes an affirmative act upon the article of import by breaking it out into its component elements, then he knowingly waives his exemption. When he borrows money upon it and places it in pledge then he mingles it with the property of the State. When he improves it, manufactures or refines it, he adds to it the labor or property of the State and necessarily mingles it with the mass of property of the State. When he sells the article of import it passes into the status of all other property. But so long as he retains the article of im-

port intact as received from the import carrier, he has done not one thing to waive that immunity.

It is true that there must be an arbitrary line drawn so that all may determine the article of import from the mass of property of the State. Common sense dictates that that line must embrace within its protection the article of import while it remains unchanged as to form or title in the hands of the original importer. Analysis of the facts and of the law clearly demonstrates that the unsold, unchanged article of import is within the protection of the Constitution.

V.

The Territories Acquired From Spain Under the Treaty of Paris Were and Ever Since Have Been Foreign to the United States in a Domestic Sense Not a Part Thereof Within the Revenue Clause of the Constitution and Outside of the Provisions Applicable to Interstate Commerce.

The vital error in the decision of the California Supreme Court consisted in its holding that:

> ". . . the word 'imports' however, as used in this Section (Clause 2, Section 10, Article I, U. S. Constitution) refers exclusively to goods shipped from a foreign country."

The subsequent error wherein Philippine imports are treated as subject to the rules of interstate commerce naturally, if not logically, follows from the first mistake.

When the constitutional and legal position of the Spanish territories came before this Court, in the Insular Tariff Cases, novel and basic principles came on for settlement. It was a settlement which involved the very

structure of the Union. A comprehensive review was made of the historical and constitutional principles which must govern in this important growth of the nation. Non-contiguous island territories were acquired. These lands were occupied with a people raised under centuries of foreign mastership. A different language, customs, strange to the American people, a legal background alien to the common-law, all were here found. Above all for Constitutional purposes, these lands were ceded as a result of a war and consequent treaty of peace. Under the Constitution this treaty was made by the Executive with the advice and consent of the Senate. The whole Congress, much less the whole people of the United States, had no part therein.

The great question for solution was: Could the President with the consent of the Senate incorporate and place on a par with the States and people of the States these foreign territories, and alien people? Must the tariff bars protecting American industry and American workmen be pushed aside for the benefit of these numerous Spanish, Indian and Oriental peoples at the behest of the President and Senate? Were Cubans, Porto Ricans and Filipinos henceforth to be made Americans without the consent of the American people or their representatives in Congress?

The Constitution is a compact between the people of the States constituting the Union. It was adopted by the whole people in order to found the National Union of the States; to define the boundaries of jurisdiction respectively among the several States and between the Federal Government and the respective States. Thereby the United States for the first time acquired its status

as a nation instead of a mere confederacy of sovereign States. The National State was given powers separate and distinct from those of any of the States; among those powers was that of acquiring and administering national unincorporated territories outside of the Union of States. These national territories are subject to the power of the national legislature, but are not a part of the Union of States. While owned by the Nation, or National State, these unincorporated territories, these alien people, are and remain foreign to the States as such. American citizenship is not granted to these alien people; their revenues and taxation are under the complete control of Congress; their systems of laws may be regulated by Congress; the privileges of the first twelve amendments do not extend to them. Vitally important from the standpoint of the case at bar, the revenue clauses of the Constitution do not bind or loose these alien territories.

Thus answered this Court to the question posed by the Insular Tariff Cases. In an international sense these territories belong to the Federal State known as the United States; in the domestic sense, as between the Federal State and any individual constituent State thereof, these acquisitions are territories unincorporated into the Union and therefor foreign. It follows, as the conclusion of the syllogism, that imports therefrom are imports from foreign lands within the revenue clauses of the Constitution; duties thereon need not be uniform; they are not subject to State taxation.

It is true that no word or sentence of the lengthy decicisions known as the Insular Tariff Cases may state all that has heretofore been given as the holdings thereof, but it is submitted that that which has been stated is the

necessary and logical meaning of these well-reasoned cases, considering both the main concurring and dissenting opinions. It is evidently this meaning which has been acceded to by Congress in dealing with these acquisitions. It necessarily follows that in the case at bar, the lumber was an "import" within the meaning of the constitutional prohibition that "No State shall lay any impost or duty on exports or imports".

1. The Insular Tariff Cases.

These cases were decided by the Federal Supreme Court between 1900 and 1903. The relation of the newly acquired territorial possessions was given such thorough consideration that the rule then laid down has ever since been followed by the three great departments of the Government of the United States. Congress and the executive have especially acted in accordance therewith.

The leading case and that in which the greatest consideration was given to the history and construction of the Constitution relating to this novel situation in our policy is that of

Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088.

In this case customs duties were levied upon goods imported from Porto Rico to New York in November, 1900, after passage of the Foraker Act. This Act provided that such imports were subject to fifteen per cent of the duties levied on articles imported from foreign countries. The duties collected were paid and the action was one to recover.

Three opinions were written; one by Mr. Justice Brown, who wrote the opinion in the *De Lima* case and a con-

curring opinion in the *Diamond Ring* case; a second by Mr. Justice White, joined in by Justices Shiras and McKenna, and the third by Mr. Justice Gray. These opinions are lengthy and present briefs for appellant. We can quote only the decisive paragraphs in each. Mr. Justice Brown comes to this conclusion (L. ed., p. 1106):

> "We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker Act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case."

Justice White arrived at approximately the same end, but through another line of reasoning. His conclusion is (p. 1127):

> "The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico."

The concurring opinion of Mr. Justice Gray comes to a like conclusion (p. 1129):

> "So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered country domestic territory, in the sense of the revenue laws; but those laws concerning 'foreign countries' remain applicable to the conquered country until changed by Congress. Such was the unanimous opinion of this court as declared by Chief Justice Taney in Fleming v. Page, 13 L. ed. 276."

The *De Lima* case, indeed, stated that the islands, after cession, became territory of the United States. In this case the customs collector under the "Dingly Act" passed in 1897, collected duties on goods imported from Porto Rico in 1899 prior to the Foraker Act of 1900 considered in the *Downes* case. The holding was that at the time the duties were levied, Porto Rico was not in an international sense a foreign country and Congress had not acted subsequent to the cession.

In the *Diamond Ring* case, the rings were seized for failure to pay duties under the Dingly tariff after importation from the Philippines. There was a like holding as in the *De Lima* case. That case and the *Downes* case were considered. The Court held in considering the effect of the *Downes* case (p. 142):

> "This view placed the territory, though not foreign, outside of the restrictions applicable to interstate commerce, and treated the power of Congress, when affirmatively exercised over a territory, situated as supposed, as uncontrolled by the provisions of the Constitution in respect of national taxation. The

distinction was drawn between a special act in respect of the particular country and a general and prior act only applicable to countries foreign to ours in every sense. The latter was obliged to conform to the rule of uniformity, which was wholly disregarded in the former."

Dorr v. U. S., 195 U. S. 138, 49 L. ed. 128, reviews the three Insular cases and adopts the theory of Justice White, and among other things here pertinently states:

"The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for temporary civil government, there is express provision that section 1891 of the Revised Statutes of 1878 shall not apply to the Philippine Island. This is the section giving force and effect to the Constitution and laws of the United States, not locally inapplicable, within all the organized territories, and every territory thereafter organized, as elsewhere within the United States."

Gonzales v. Williams, 192 U. S. 1, 48 L. ed. 317, is not very helpful either way. Gonzales emigrated from Porto Rico to the United States. He was detained as an alien under the 1891 Act. The Court expressly refused to consider that he was a citizen. It confined itself merely to the narrow point as to whether he was an alien in the meaning of the Act, and he was found to be a passenger "from territory or other place" subject to the jurisdiction of the United States and hence admissible.

Dooley v. U. S., 183 U. S. 151, 46 L. ed. 128.

Here goods were imported into Porto Rico from New York subsequent to the Foraker Act. The attack on the

right to collect the duties was confined to the clause of the Constitution providing that "no tax or duty shall be laid on articles exported from any State". On arguing the point the Court stated:

> "One thing is entirely clear. The tax in question was imposed upon *goods imported into Porto Rico,* since it was exacted by the collector of the port of San Juan after the arrival of the goods within the limits of that port. From this moment the *duties became payable as upon imported merchandise."*

And the Court proceeded to hold that the duty was properly collected upon the rules of *Downes v. Bidwell* that Congress could lawfully impose a duty upon imports from Porto Rico.

Cases which are cited to the effect that imports refer only to goods brought from foreign countries, it must be noted, are all prior to the acquisition of the cessions from Spain. The question here raised did not occur to the Court. However, the Insular Tariff cases uphold taxes upon "imports" from the islands. The cases subsequent thereto take as unquestioned the fact that goods brought therefrom are true "imports". Congress has consistently levied imposts thereon since the Tariff cases. The islands are "foreign" to the United States for all tax, customs, impost and duty requirements.

> *Cincinnati Soap Co. v. U. S.,* 301 U. S. 308, 81 L. ed. 1122.

A United States Revenue Act imposed a tax upon the first domestic processing of cocoanut oil, and provided that such tax on oil wholly of Philippine production should be held as a separate fund and paid to the Philippine Treas-

ury. The Court held that Congress had the plain right to levy the tax and had the plain right to appropriate the money accruing therefrom for the benefit of the islands. It further states (p. 1131):

> "It is not improbable that a failure to exercise control over imports from the Philippines would injuriously affect the industries of this country; and, on the other hand, an exercise of the power to tax imports might prove injurious to the people of the islands. Congress, in passing the legislation here under consideration, is not forbidden to balance these respective probabilities."

Conversely to the Insular possessions, Hawaii and Alaska have each been incorporated by Acts of Congress as a part of the territory of the United States. The distinction bears fruit in the cases dealing therewith. The Constitution extends to and the tariff laws cover each of these territories. The Court so finds, first as to Hawaii, second as to Alaska. Each of the following cases was decided by the same judges who decided the Insular cases. In each case the Court expressly stated that it was unnecessary to consider the Insular Tariff cases as they dealt with the unincorporated possessions. The cases are:

Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016;

Binns v. U. S., 194 U. S. 486, 48 L. ed. 1087.

Later cases reaffirm the tenets of the Insular Tariff cases in holding that the Philippine Islands do not form

"part of the United States because not incorporated therein".

Dowdell v. U. S., 221 U. S. 325, 31 Sup. C. Rep. 590;

Board v. Ynchausti, 251 U. S. 401, 40 Sup. C. Rep. 277.

But even territories so incorporated into the United States are not on a parity as to their rights and duties with the states of the Union. Section 9, Article I, of the Constitution provides:

> "No preference shall be given, by any regulations of commerce or revenue, to the parts of one state over those of another."

The Court construed this section on a claim that an Act of Congress operated as a preference against Alaska. The Court held that Alaska, although a territory incorporated into the United States, was not a state, in the case of

Alaska v. Troy, 258 U. S. 101, 66 L. ed. 487.

> "The appellants insist that 'state' in the preference clause includes an incorporated and organized territory. This word appears very often in the Constitution, and, as generally used therein, it clearly excludes a 'territory'. To justify the broad meaning now suggested would require considerations more cogent than any which have been suggested."

The Insular Tariff cases were reviewed by Chief Justice Taft, former Governor of the Philippines, in a

criminal case where a fruitless demand for jury trial had been made. He reaffirmed that the Constitution did not cover the islands and stated in reference to the Tariff cases.

Balzac v. Porto Rico, 258 U. S. 298, 66 L. ed. 627.

"It was further settled and confirmed that neither the Philippines nor Porto Rico was territory which had been incorporated in the Union or become a part of the United States, as distinguished from merely belonging to it; and that the acts giving temporary governments to the Philippines and to Porto Rico had no such effect."

Asiatic v. Insular Collector, 297 U. S. 666, 80 L. ed. 967.

Perhaps the most significant and pertinent to the exact point in issue is the ruling in the following case. In *McGoldrick v. Gulf Oil* (309 U. S. 414, 84 L. ed. 840) the Court had held that a sales tax levied by New York on fuel oil imported to a bonded warehouse and then sold and delivered as ships stores was invalid under the exclusive right of the United States to regulate foreign commerce. Here the converse is presented.

Porto Rico levied a like sales tax upon oil imported for sale in bond. The Court held that the *McGoldrick* case dealing as it did with a state tax did not apply to an unincorporated possession wholly under congressional control; that "imports" from the United States, just as

imports from any foreign country, were subject to the tax.

West India v. Domenech, 311 U. S. 20, 85 L. ed. 16.

What is the real distinction between a possession and a territory incorporated into the United States? This is a natural query and its answer is of vital assistance in determining the basic reason underlying the respective treatments of these acquisitions. No clearer statement of the difference can be found than in the opinion of Justice, later Chief Justice, White in the *Downes v. Bidwell* case.

He recalls that under the same treaty in which Spain ceded Philippines and Porto Rico it ceded the sovereignty of Cuba to the United States. Yet the Court held in *Neely v. Henkel* (180 U. S. 109, 45 L. ed. 448) that Cuba was not incorporated into the United States and was a foreign country, but sovereignty was held until the United States in its exclusive discretion should determine that sovereignty to the people of the island.

He notes that the treaty power under which these islands were acquired is vested by the Constitution in the President and Senate, distinct from Congress; he then shows the dire consequences to the people of the United States in case these agencies were enabled, without the consent of the American people, to force an alien people witn foreign customs, habits and standards of living on a parity with the citizens of the States. Granted this

power in the treaty making authorities, the converse is true. Such authorities, without consent of the people, would be enabled to transfer American citizens and soil to a foreign power. A pertinent observation of this opinion, written in 1910, is the foreshadowing of that which is now coming to pass. He saw a possible future determination of Congress, along the line of its action in Cuba, to permit the millions of inhabitants of the Philippine Islands to establish an autonomous government which would cease to be under the sovereignty of the United States.

The decision answers the question posed above. The distinction between a possession such as the Philippines and territory incorporated into the United States is essentially that the possession is subject to alienation at the will of the people expressed through their Congress, while an incorporated territory remains forever an integral part of the nation. It follows therefrom that territory can be incorporated into the Union only by an express Act of Congress acting as the constitutional representative of the whole people. It is only after such an express incorporation that the constitutional provisions are applicable to the people and lands so incorporated. Until that express act the possession is under the control of Congress manifesting the sovereignty of the Union, but the possession, its people, and its commerce are foreign to the people of the States.

2. Legislative and Executive Procedure. Congress Has Dealt With the Possessions as Foreign to the States of the Union.

A. SOVEREIGNTY.

Congress, since the Insular Tariff cases, has invariably dealt with the Philippines as foreign to the States. In the Jones, or Autonomy Act, it declared its purpose that the people of the United States intended to withdraw their sovereignty over the islands and recognize their independence as soon as stable government could be established therein. This was followed by the decisive Act of 1933 providing for the adoption of a constitution and the erection thereunder of complete executive, legislative and judicial departments. (*United States Code,* Chapter 5, Title 48.) A constitution was accordingly adopted in 1935 and approved during that year by the President of the United States. Provision is made by the Enabling Act and Constitution for complete independence on July 3, 1946. During the intervening period the Act in itself provides for the levy at scheduled times of export duties for Philippine benefit on certain goods exported to the United States and for import duties to be levied by the United States upon certain goods imported from the Philippines.

B. TARIFF.

Since the Insular Tariff cases, Congress has consistently levied import duties upon goods coming from the Philippines. It is true the revenues derived therefrom sometimes have been appropriated to the Phillipines, but

nevertheless they were true tariff imposts upon imports. The present law (Title 19, Section 1301) provides in part as follows (Act of June 17, 1930):

> "There shall be levied, collected and paid upon all articles coming into the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from foreign countries."

This is followed by a long list of provisos which redound to the benefit of the Philippine Treasury.

Section 577 of the same title makes all customs administrative provisions of the Tariff Act applicable to articles coming from the Philippines, thus treating the islands on an exact parity with foreign countries under the Tariff Act.

C. Philippines Treated by Congress as Foreign.

Recurring to the Philippine Independence Act of 1933, it, in itself, defines the islands as foreign to the United States. It provides in part that United States

> "Foreign Service Officers may, under commissions as diplomatic and consular officers, be assigned to the Philippine Islands, during which assignments such officers shall be considered as stationed in a foreign country."
>
> *United States Code,* Title 48, Sec. 1238-a.

Section 1238 of the same title provides in part:

> "Citizens of the Philippine Islands, who are not citizens of the United States, shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty."

Congress in the same act, Section 1247-a, eliminated the Islands from the United States when it defined the United States as including "all territories and possessions other than the Philippines."

Title 10, U. S. C., Army, Section 540, under heading "Detail of officers and men to assist foreign governments", provides that the President may detail officers and men of the Army to assist the governments of republics of the Western Hemisphere and the Philippines.

Finally the Constitution of the Philppines approved by Congress provides that it is established to develop the nation and (Article II, Section 1)

> "The Philippines is a republican state. Sovereignty resides in the people and all government authority emanates from them."

The Constitution, modeled after that of the United States, provides for all of the elements of a sovereign nation except that pending complete independence its foreign affairs shall be under control of the United States, and certain defined legislative acts tending to affect foreign relations must have approval of the President of the United States. The Philippines are and since 1935 have been as much a country foreign to the United States as was Cuba. This nation simply exercises over the islands a benevolent guardianship. There is only a matter of degree as to the extent of that benevolent guardianship over all of the small countries in and bordering on the Caribbean Sea under the persuasive effect of the Monroe Doctrine. It may well be said that while the Philippines are subject to allegiance to the United

States in a nominal sense, they have the attributes of actual sovereignty; they are a possession of, but not a part of, the United States.

D. CALIFORNIA CASES.

The California courts and taxing authorities have uniformly adopted the view that for all tax purposes the imports from the Philippines are to be dealt with as those from a foreign country and imports are protected against local taxation under Article I, Section 10, of the Federal Constitution.

Philippine Ref. v. Contra Costa, 24 Cal. App. (2d) 665;

Johnson v. County of Los Angeles, 31 Cal. App. (2d) 579.

In the following cited case turning on the citizenship of a Filipino under the firearms possession law, the Court stated:

People v. Cordero, 50 Cal. App. (2d) 146.

"Finally in 1933 at the request of that domain Congress enacted a statute granting complete independence to the Philippine Islands effective as of July 3, 1946. If they are to be granted such independence, their people could not now be our citizens and *the islands could not now be a part of the United States.* If they were then complete independence would be a secession—a right which perished forever in the flames of civil war. Their present status makes the native of the Philippines an associate in peace and our ally in war. . . . No legislation was ever enacted nor any treaty approved which placed the Philippine Islands in the same status as that of territorial possessions belonging to the United States."

Resume.

The Insular Tariff cases affirmed once and for all that the United States is an indissoluble union of the separate States under a common Constitution. The Constitution outlines the rights of the nation and of the various States and their people. In the interests of the people of all of the States, as a nation, restrictions are laid upon the individual State and the people thereof. It gives sovereign rights to the nation, as representative of all of the people. One of these sovereign rights is the possession of lands subject to the authority only of the nation. Such lands are not an integral part of the nation. The result is that such lands are outside of and foreign to the union of States.

The island territories ceded by Spain including Cuba, Porto Rico and the Philippines, presented a problem of constitutional construction undreamed of by Jefferson, Hamilton or Madison. Their utmost vision went to the contiguous territory extending to the western wilds of the Mississippi. Here were an alien people, speaking a foreign tongue, accustomed to the civil rather than the common law. In the instance at bar it was an Oriental rather than an Occidental people. The Court determined that these ceded lands, indeed, belonged to the United States, but did not become incorporated therein as a part thereof. The Constitution did not follow the flag. These foreign lands owned by the nation were placed for all tariff and tax purposes outside of the United States and foreign thereto. "Those laws concerning 'foreign countries' remain applicable to the conquered country until changed by Congress."

Congress by the Constitution is given the exclusive right to lay imposts and duties; the States are expressly forbidden so to do, but yet such imposts and duties must be uniform throughout the United States. Under these provisions the Supreme Court has consistently held that goods bought from the Philippines are "imports" and subject to the levy of customs by Congress. As the Philippines are not part of the United States, a different tariff may and has prevailed therein. Congress has consistently since 1902 laid import duties upon goods coming from the islands and does now so do.

The rule of *Brown v. Maryland,* developed in the opening brief, must apply. It was there held by Chief Justice Marshall that:

> "The payment of duties to the United States gives the right to sell the thing imported and such right to sell cannot be forbidden the importer by the States."

Federal Courts Hold Interstate Commerce Clause Does Not Apply to Insular Possessions.

It has been uniformly held by the Federal Circuit Courts of Appeals and the District Courts that the commerce clause does not extend to Porto Rico. Therefore, as the Philippines are in the same status, the conclusion of the Supreme Court of California in this respect was in error.

Lawrence v. Wardell, 273 Fed. 405;

Neuss-Hesslim v. Edwards, 24 Fed. (2d) 989, 30 Fed. (2d) 620;

Lugo v. Suayo, 59 Fed. (2d) 386-90;

Sancho v. Bacardi, 109 Fed. (2d) 57-63.

Conclusion.

Careful consideration of the Constitutional law applicable to the case at bar demonstrates that the ruling of the Supreme Court of the State of California was in error. It was long since determined by this Court and Congress has ever since accepted and acted upon that ruling, that goods brought from the Philippines are imports and subject to customs duties. The Philippines, though not foreign in an international sense, are foreign to the Union of the States in a domestic sense and are outside of the restrictions applicable to interstate commerce; imports therefrom are within the immunity from State taxation.

The tax levied by the State in this case was one levied upon a foreign importation retained by its owner and importer in the original packages of import and without waiver of the Constitutional immunity inherent thereto. The property upon which the tax was levied was beyond the jurisdiction of the State to tax; the tax levied was therefore void and petitioner was entitled to its recovery.

Many cases, involving not only imports from the Philippines, but from Australia, Ecuador, Nicaragua and other countries adjacent to the Pacific Ocean are pending awaiting the final ruling in this case. The questions presented here and determined in the decision of the District Court of Appeal, must be decided either in this case or in successive cases to be carried to the upper courts. In

the interests of justice, of economy and expedition in the determination of these questions, petitioner respectfully prays, on its own behalf as well as on behalf of the great commercial business of the Pacific Coast, that the main issues presented in the courts below will be considered and determined by this Honorable Court.

Respectfully submitted,

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Attorney for Petitioner.

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Of Counsel.

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CLERK

In the Supreme Court
OF THE
United States
OCTOBER TERM, 1942

No. [redacted] 76

DANT & RUSSELL, INCORPORATED,
Petitioner and Appellant,
vs.
BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, and WILLIAM A. SMITH, DOCTOR OSCAR HAUGE, ROGER JESSUP, JOHN ANSON FORD and GORDON L. McDONOUGH, as members of and constituting said Board of Supervisors of the County of Los Angeles, State of California, and J. H. O'CONNOR, County Counsel of the County of Los Angeles, State of California,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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County Counsel, In pro per.,
And as Counsel for Respondents.

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Deputy County Counsel,
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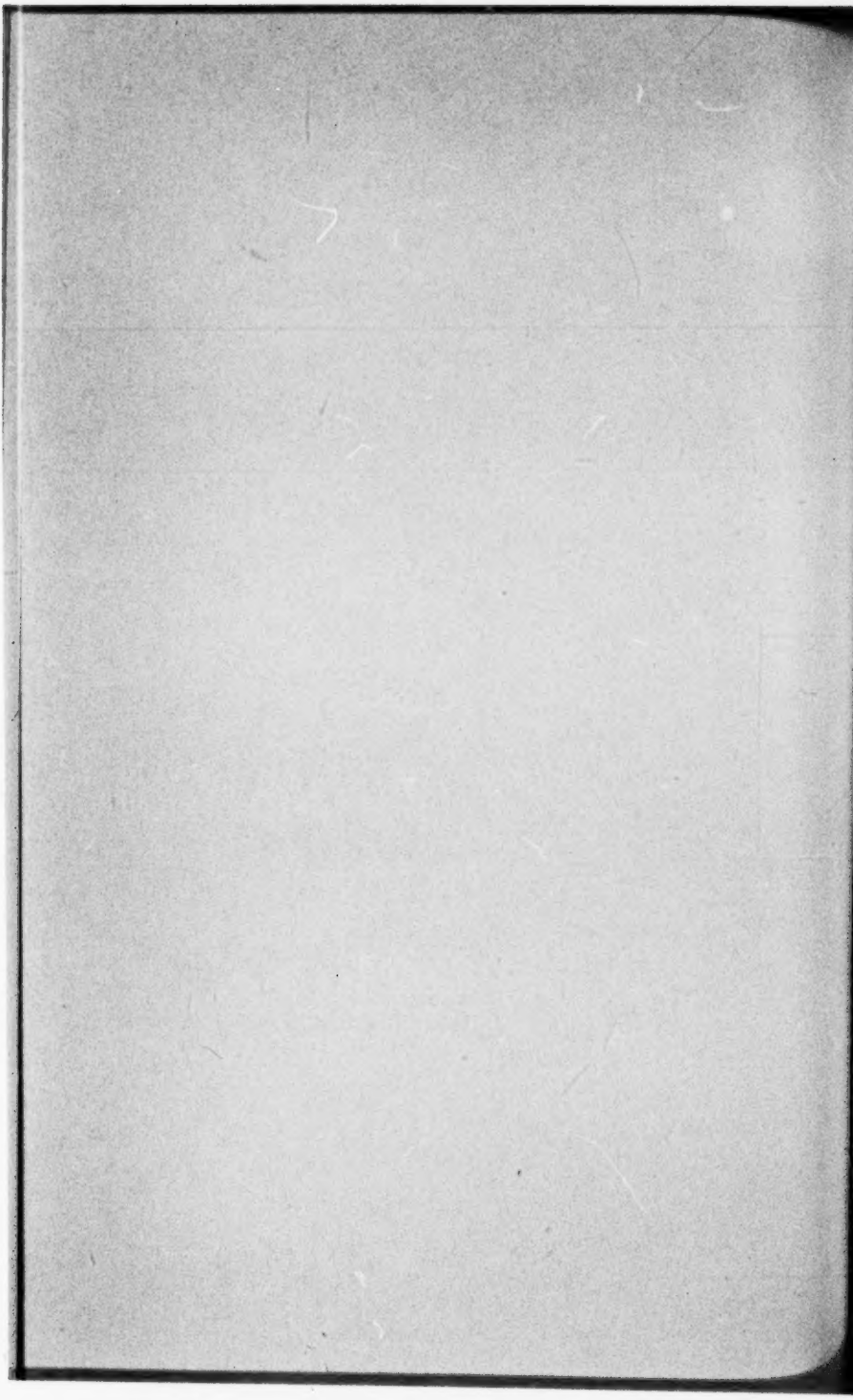

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 1059

DANT & RUSSELL, INCORPORATED,
Petitioner and Appellant,
vs.
BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, and WILLIAM A. SMITH, DOCTOR OSCAR HAUGE, ROGER JESSUP, JOHN ANSON FORD and GORDON L. McDONOUGH, as members of and constituting said Board of Supervisors of the County of Los Angeles, State of California, and J. H. O'CONNOR, County Counsel of the County of Los Angeles, State of California,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A

Statement of Facts

The petition for writ of certiorari herein asks review of a judgment by the Supreme Court of the

State of California affirming judgment by the Superior Court in and for the County of Los Angeles. The Superior Court had denied Dant & Russell's petition for writ of mandate to compel respondent county officers to cancel an assessment of certain of its property. Respondents demurred to the petition. The demurrer was sustained and judgment was rendered refusing the writ. The Supreme Court of the State affirmed that judgment. Petitioner then filed this petition for writ of certiorari.

In considering this petition for certiorari this Honorable Court need not consider either of the two constitutional questions which petitioner has argued in its brief. The controlling consideration herein on the question whether the writ should issue need not concern the opinion of the State Supreme Court (nor its declaration as basis therefor that the Philippine Islands are not a foreign country under the imports clause of the constitution), nor concern as further possible basis for support of the opinion the question as to the liability to state taxation of mere portions and remnants of an importation remaining after portions of the import have been sold, and such remnants and remaining portions now themselves as well offered for sale. The question for consideration upon this petition for writ of certiorari, instead, is merely whether the state court should have granted the petition to compel respondent officers to cancel the assessment. Answer to that question depends on whether the petition for the

writ stated facts within and showed conformity to the requirement of a state statute such as to authorize and require the cancellation sought.

Petitioner's contention, of course, is that the assessment should have been cancelled pursuant to prayer of the application declared on and denied by respondent Board of Supervisors. Respondents on the other hand respectfully submit that even without going into any suggested federal question, denial of the writ of mandate was required under the law. Even independent of any determination of the constitutional points, the judgment of the California Court was sound. Under the statute, upon the facts as shown of record, cancellation could not have been ordered.

The petition for the writ of mandate recites "that on or about the 15th day of November, 1939, petitioner . . . did file with the defendant, J. H. O'Connor, County Counsel of the County of Los Angeles," what the petition herein styles "its duly verified petition in writing," together with two supporting affidavits (R. 5), copies thereof attached thereto (Ib., 8-10); and that petitioner "did request the said defendant, J. H. O'Connor to consent to said cancellation" (R. 5); but that he refused to consent and that the Board denied the petition (R. 6); that the Board's action was based alone on said "verified petition in writing" and said attached affidavits, without other showing or evidence.

Thereafter the action was filed praying mandate to compel the cancellation.

B

Position of Respondents

Petitioner's action in the state courts sought by mandamus to compel respondent public officers to consent to the cancellation of and to cancel a certain assessment. California statute does authorize the cancellation of an uncollected tax or assessment under certain prescribed conditions. Petitioner, however, never requested the cancellation. (In this, as in any other recital of fact herein, we only recite the facts as we have them from petitioner itself. Our recitals do not purport to be of matter *in pais* but only upon the record as petitioner has made it and here presented it. Such only is our factual presentation, i. e., we attempt to present and analyze the facts only as shown of record—otherwise we make no representation of fact.)

Moreover, the conditions prescribed for cancellation did not exist. Consideration of the provisions of the California statute will indicate that the cancellation could not have been made, and that the California courts necessarily and soundly refused the writ to compel it, and that this petition for writ of certiorari now, too, must be denied by this Honorable Court.

The writ of mandate was rightfully refused and the judgment of the California court was sound for the following reasons, to wit:

(1) Petitioner never requested cancellation of assessment or taxes.

(2) The petition did not show the situation prescribed for cancellation, viz, "uncollected" taxes. It showed, instead the taxes already discharged and paid.

(3) The petition failed to recite any of the grounds for cancellation prescribed by the statute.

(4) Petitioner upon presenting its petition before the Board failed to comply with the statute requirement of proof to support the petition.

C

Argument

I.

The Writ of Mandamus was Rightfully Refused: The Petition to Cancel Submitted to the County Counsel and Denied by the Board Could Have Been Granted Only if it Complied with the Requiremnts of Statute.

The act which petitioner sought to compel by writ of the California courts was cancellation by respondent public officers of a certain assessment. Petitioner sought by mandamus to compel performance of alleged duty to cancel. To justify the mandate sought petitioner must show that cancellation was respondent officers' duty under California statute. The statute in question is Section 3804a of the Political Code of the State. Respondents agree with us as to the statute

involved. The petition for writ of mandate itself cites the controlling statute; e. g., recites "that on or about the 15th day of November, 1939, pursuant to the provisions of *Section 3804a of the Political Code* of the State of California, petitioner did file with the defendant, J. H. O'Connor, County Counsel of the County of Los Angeles, State of California, and legal advisor of the Board of Supervisors of said County, its duly verified petition in writing . . . as required and provided in the aforesaid provisions of *Political Code Seeton 3804a.*" (R. 5-6.) In closing, the petition prays the mandate of the California Court commanding that:

> "(a) The Board of Supervisors . . . forthwith order, pursuant to the provisions of *Section 3804a of the Political Code* of the State of California, the cancellation of the aforesaid illegal and erroneous assessment, as being erroneous and illegal; . . . " (R. 7.)

That statute, so far as here material, reads as follows:

> "Any uncollected tax, or assessment, or portion thereof, or penalty or costs thereon, heretofore or hereafter assessed, charged or levied more than once, or erroneously or illegally, or upon that portion of an assessment found to be in excess of the actual cash value of the property assessed, by reason of a clerical error of the assessor, or upon an assessment for improvements on land when such improvements did not in fact exist at the

time said tax or assessment became a lien, or upon an assessment of property which after the time said tax or assessment became a lien was acquired and owned by the state, or by any county, city and county, municipal corporation, school district or other political subdivision and which, because of such public ownership, is not subject to sale for delinquent taxes, may, upon satisfactory proof thereof, be cancelled by the officer having custody of the record thereof upon the order of the board of supervisors, or other governing board with the written consent of the district attorney, city attorney or legal advisor of said board, . . . "
(*Pol. Code*, Sec. 3804a.)

The cancellation which petitioner desired would constitute striking an item from the assessment roll of the County of Los Angeles. It would constitute alteration of a public record. Alteration of a public record, except as authorized by law, is forbidden as a public offense and punishable as a felony. The Penal Code of California declares that:

"Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person so to do, is punishable by imprison-

ment in the state prison not less than one nor more than fourteen years." (*Penal Code*, Sec. 113.)

The public officer's entire innocence of wrong intent or his entire good faith in making an interdicted alteration would constitute no defense. (*People v. Johnson*, 14 Cal. App. (2d) 373.)

II.

The Writ of Mandamus was Rightfully Refused: Petitioner Never Requested the Cancellation

Petitioner, by petition to the California courts, sought their mandate to compel cancellation of a certain assessment. Therein, however, petitioner was seeking to compel something which petitioner had never requested. Petitioner had never requested the act which it sought to compel. The petition for writ of mandate alleges only that "petitioner did file with the defendant J. H. O'Connor . . . its duly verified petition . . . and did request the said defendant J. H. O'Connor . . . to consent to said cancellation. . . . " (R. 5.) The petition does not allege that petitioner ever requested cancellation of the Board. The only recital with regard to the Board is that "said petition was by defendant Board . . . denied." (R. 6.) The request was made by "duly verified petition." But upon inspection of the "duly verified petition" we see that it requested neither cancellation nor consent to cancellation. The petition for mandate does not allege that cancellation was re-

quested; and, in fact, no such request was made by the "duly verified petition."

Although the petition for the writ of mandate *does* make an allegation as to the County Counsel and does in terms allege that petitioner requested the County Counsel to consent to cancellation, that allegation is explained and modified by an exhibit attached to the petition. That general allegation is made specific and is clarified, and precisely what the pleader means is shown by reading further. The request was made in writing; the writing is attached; and inspection thereof shows that the request was not indeed for cancellation or for consent to cancellation, but, instead, was request for tax refund. The pleader's conclusion in general language that petitioner requested the County Counsel to consent to cancellation is refuted by the exhibit attached, which makes definite the general allegation and shows that the request was for a refund. An exhibit attached to a pleading may modify its recitals and qualify its general language. It may constitute the recitals in the pleading mere pleader's conclusions, and not factual recitals, and show what were indeed the facts. (*Baudini Estate Co. v. Payne*, 10 Cal. App. (2d) 623; *Rittersbacher v. Board of Supervisors*, 220 Cal. 535; *Natl. Paving Corp. v. Hutchinson*, 132 Cal. App. 235; *Peak v. Republic Truck Sales Corp.*, 194 Cal. 782; *Botsford v. Levy & Zentner*, 123 Cal. App. 204, 209.)

Petitioner attached to its petition for writ of mandate the application which the Board denied. That attached application is not a petition for cancellation, but, instead, is a claim for refund of taxes. (R. 8.) In no particular is it a cancellation petition. Entitled a claim "For *Refund* Excess Taxes Paid," it identifies the assessment of petitioner's property and specifically asks "*refund* of tax paid by claimant on hardwood lumber. . . . " It states the assessed valuation and the amount of the "taxes *paid*" thereon, repeats statement of the amount of such tax, and again recites that amount as the "amount of *claim.*" The subjoined verification of the Secretary of petitioner corporation swears to the truth of the items and statements and that "the amount therein is justly *due* this claimant, and that the same is presented within three years after the said *claim* has accrued." (R. 8-9.) To such refund claim (not cancellation application) is attached an affidavit by Thomas W. Dant, Assistant Secretary of petitioner corporation. Such affidavit recites that petitioner is an Oregon corporation and imports Philippine mahogany from the Philippine Islands; has in the yard of Cadwallader-Gibson Company, Inc., in the City of Long Beach, County of Los Angeles, a quantity thereof in the same shape and condition as when imported; that none of it is sold in the State of California and will finally all be shipped out of California. (R. 9.) The affidavit of Roy Barto, President of Cadwallader-Gibson Company, Inc., recites maintenance of its lumber yard in Long Beach,

California, and storage and handling therein of Philippine lumber for petitioner under express condition that petitioner not sell the lumber within the State of California, and affiant's belief of petitioner's compliance therewith.

Not only was there no cancellation application, but only a refund claim—it was a claim only with regard to the 1938 taxes; as to the 1939 taxes there was no claim whatever. That is to say, the petition for writ of mandate recited assessment and tax of petitioner's lumber for the two years 1938-9 and 1939-40. (R. 3, par. III.) Thereafter the reference by the petition for writ of mandate is merely to the "assessment," i. e., "that such assessment is and was erroneous and illegal" (R. 3, par. IV), and prayer that the Board order the cancellation of "the aforesaid assessment" (R. 7), and that the County Counsel consent in writing to the cancellation of "the aforesaid assessment." (R. 7.) The refund claim (not cancellation application) to the Board is with regard to the 1938 tax only. It makes no reference to the tax of 1939 or any other year.

The refund claim (not cancellation application) and supporting affidavits did not request cancellation or consent to cancellation of any tax or assessment. It imposed on such officers no duty as to cancellation and necessarily afforded no basis for seeking from the court mandamus to compel them to cancel. The situation then is that petitioner went to court and petitioned

for a writ to compel the Board to do something that the Board has never been asked to do and had been given no opportunity to do. How allege a duty or nonperformance of duty! The state courts of necessity were bound to refuse the writ.

III.

The Writ of Mandamus was Rightfully Refused: The Petition for Cancellation Itself Alleges that the Tax Has Been Paid and Asks Its Refund.

The cancellation was sought under California statute. The question whether the petitioner complied with the requirements of the statute, and whether petitioner entitled itself to the relief which it sought by mandate to compel, must be answered by referring to the petition to the California court and the facts as therein shown. Respondents demurred to said petition and admitted the facts therein well pleaded. The statute, as herein above quoted (pp. 6-7), authorizes cancellation of an "*uncollected*" tax and only upon the grounds therein recited.

The situation in which the California statute authorizes the cancellation of a tax or assessment is if it is "uncollected". The petition submitted to the County Counsel and denied by the Board of Supervisors, however, was not a petition with reference to an "uncollected" tax. It was, instead, as entitled, a claim "For Refund Excess Taxes Paid." (R. 8.) As indicated under last preceding point II herein, the application

was for refund—not for cancellations, and, as already noticed, its recitals were that the taxes had been *paid.* Clearly, the claim presented to the Board did not ask for cancellation but for refund, and, in support thereof, recited *payment* of the taxes.

The present petition for writ of certiorari, personally verified by both of the individual counsel for petitioner (Pet. 12-13), as well, recites payment of the taxes in question. Therein we read that "Petitioner *paid* taxes on these assessments respectively of $276.43 and $521.20, a total of $797.63." (Pet. 3.) And again, that "in its petition for the writ petitioner alleges that its property, to wit, the taxes *paid,* was taken without due process of law. . . . " (Pet. 4.) Under heading, "The questions presented," the petitioner similarly asks:

> "Third: Were the taxes *exacted by and received by the County* under the guise of its statutory lien taken without due process of law?" (Pet. 5.)

Again, the petition recites:

> "Petitioner *paid,* in order to release from sale, total taxes of $797.63." (Pet. 6.)

Petitioner's brief, as well as its petition, construes its petition as showing a situation of taxes paid. Therein counsel says:

> "(2) In its petition for the writ petitioner alleges that its property, to wit, the taxes *paid,* was

taken without due process of law. . . . " (Pet. & Br. 17.) (*Our Emphasis.*)

The writ of mandate sought cancellation with regard to taxes already paid. The situation shown and now argued necessarily places the case outside the statute affording relief only as to an "uncollected" tax or assessment.

Petitioner has misconceived its remedy. Petitioner's remedy, if any, was not to seek from respondent County Counsel consent to, and from respondent Board an order for, the cancellation of taxes. The taxes were already discharged by reason of payment. Petitioner's remedy, if any, instead, was suit for recovery of the taxes paid, provided such suit lay, because of taxes paid involuntarily and under duress, or because refundable under possible statutory authority. If then, under California law, remedy lay for taxes paid either for involuntary payment or under statutory authority, the remedy would lie only if the facts presented a case authorizing the same.

IV.

The Writ of Mandate was Rightfully Refused: The Petition Recited None of the Statutory Prescribed Grounds for Cancellation.

Cancellation upon proper petition is authorized only upon some one or more of the grounds prescribed by the statute, to wit, (1) if assessed or levied more than once; or (2) if assessed erroneously or illegally; or

(3) if assessed above the actual cash value by clerical error; or (4) if an assessment of non-existent improvements; or (5) if acquired by the government after assessment. Petitioner's "duly verified petition in writing" attached to the petition for writ of mandate (R. 8) attempts to set up or even suggests not one of the prescribed grounds for cancellation.

Petitioner's "duly verified petition" to the Board not only recited a situation affirmatively outside the statute (taxes *paid* rather than "uncollected"), it did not mitigate such affirmatively disqualifying recital by reciting any ground of cancellation within the statute.

V.

The Writ of Mandamus was Rightfully Refused: Noncompliance with the Statute's Requirement of Proof to Support the Petition for Cancellation Required Its Rejection and Precluded Mandamus to Compel Its Allowance.

The statute authorizes cancellation only under some one of the prescribed circumstances and only "upon satisfactory proof thereof." Not only did petitioner fail to request cancellation—petitioner failed also to offer "satisfactory (or any) proof" of any ground for cancellation. The petition for writ of mandate specifically recites instead want of any proof. It says of the Board's action in denying its application:

> "That the aforesaid action of the Board of Supervisors of the County of Los Angeles, and the Sup-

> ervisors, as members of said Board, was without any other evidence oral or written, before said Board, except as contained in said petition and in said affidavits attached thereto." (R. 6.)

In other words, petitioner did not offer the prescribed "satisfactory (or any) proof" to the Board of Supervisors to substantiate a request for cancellation. And neither the refund claim nor the affidavits attached thereto afford any aid.

The petition for writ of mandamus specifically and affirmatively alleges presentation of no evidence, oral or written, before the Board (except the petition itself and the attached affidavits). The want of such proof was and could only be fatal to the petition and thereafter fatal to the application for mandamus to compel the Board to grant the petition, and now finally be fatal to this petition for writ of certiorari.

D

Conclusion

The writ of certiorari herein sought should be denied. The ruling by the California Superior Court, thereafter affirmed by the California Supreme Court, denying the writ of mandamus, was the proper and necessary determination. The cancellation sought to be compelled was never requested, and the factual situation shown of record was outside the statutory remedy. The cancellation might not legally be made under the

statute or have been ordered by the California courts; and we respectfully submit certiorari should be denied.

Respectfully submitted,

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County Counsel, *In pro per.,*
and as Counsel for Respondents.

GORDON BOLLER,
Deputy County Counsel,
Of Counsel.

FILED
SEP 30 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1059 76

DANT & RUSSELL, INCORPORATED,

Petitioner and Appellant,

vs.

BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, and WILLIAM A. SMITH, DOCTOR OSCAR HAUGE, ROGER JESSUP, JOHN ANSON FORD and GORDON L. MCDONOUGH, as members of and constituting said Board of Supervisors of the County of Los Angeles, State of California, and J. H. O'CONNOR, County Counsel of the County of Los Angeles, State of California,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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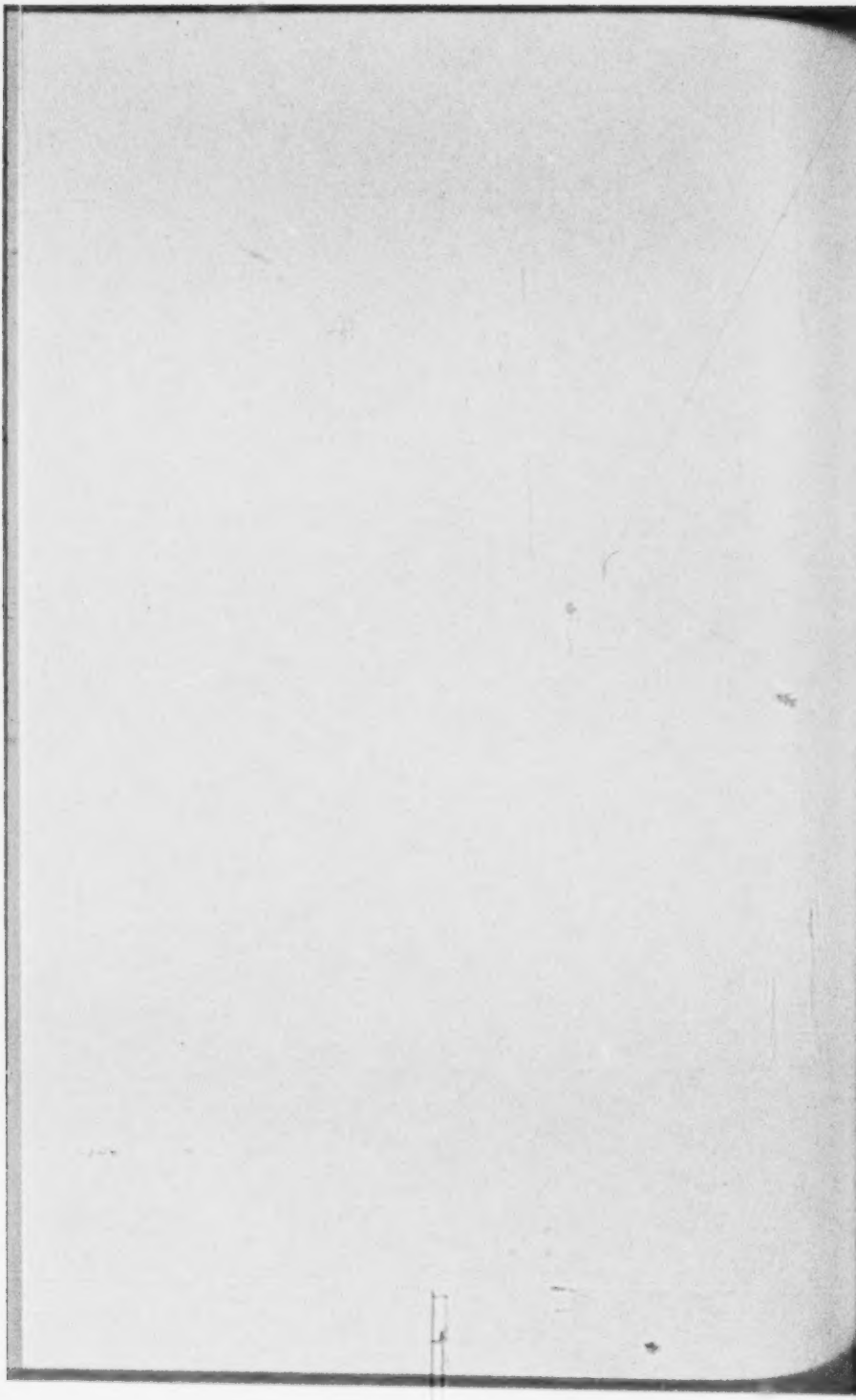

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Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The Federal Question.

The three State Court decisions closely concerned themselves with the Federal Constitutional question. The attempt here is made to show that a decision might have been made on a non-federal ground. But that is not the test of the jurisdiction of this Court. Otherwise a State decision impairing the operation of Federal laws, such as a State decision at bar, could stand, because, perchance, some immaterial State question might have been involved. The rule is stated in

Indiana ex rel. v. Anderson, 303 U. S. 95; 82 L. Ed. 685.

"Where the State Court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment. We cannot refuse jurisdiction because the State Court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground."

State Practice.

No State Court decision adverse to the position of petitioner has been or can be cited. Such decisions, where found, support petitioner on the matter of state practice. Respondents rest solely on their *ipse dixit*. These points of practice are here raised for the first time; they were never considered by any of the State Courts. If there raised, the decision under the authorities hereinafter cited must have been adverse to respondents.

Three California courts gave this case careful consideration—the Superior Court, the District Court of Appeal, and the Supreme Court. The fourth amended petition presented here indicates three prior pleadings in the trial court. The District Court of Appeal upheld petitioner's contentions; the Supreme Court twice gave the case its attention. The opinion of all of these Courts dealt exclusively with the Federal Constitutional question. Remarkable is it that respondents have the temerity to insinuate that a possible State practice decision could have been adequate; no one of the State Courts ever did or could have held with respondent on these matters here raised for the first time.

ARGUMENT.

I.

Cancellation, Under the Statute, Was the Duty of the Board of Supervisors. The Writ of Mandamus Was the Proper Remedy.

The assessment was, as shown in the opening brief, erroneously and illegally levied. The affidavits show the grounds. The export clause of the Federal Constitution applies on the facts as stated in the affidavit of Thomas W. Dant. True, it requires striking these items from the assessment roll. The California law requires this in order to rectify an injustice. The striking out of this public record is made by officers authorized by law so to do. The statute has been held valid and constitutional by the State Courts.

People v. Board of Supervisors, 126 Cal. App. 610-13;

City of Los Angeles v. Ford, 12 Cal. (2d) 407-11.

The State Courts have further held that mandamus is the proper remedy; that the duty of the Board of Supervisors to strike out the illegal or erroneous assessment is positive and not a matter of discretion.

Los Angeles v. Board of Supervisors, 108 Cal. App. 655-66.

"If a showing was made in this case of the invalidity of the assessment, it was mandatory upon the Board to act."

City of Los Angeles v. Ford, 12 Cal. (2d) 407-11;

People v. Board of Supervisors, 126 Cal. App. 670-3.

II.

The Statutes for Correction of Errors in Tax Collection Are Remedial and Should be Liberally Construed.

Unquestionably the form of the claim made, as the exhibits show, was in accordance with Section 3804 of the Political Code which deals with the case of refunds demanded where the tax has been paid rather than 3804a which deals with the mere assessment. Both sections deal with the case of taxes "erroneously or illegally collected." But the greater includes the lesser. Necessarily, demand for refund requires a cancellation of the assessment. Necessarily, if the assessment is cancelled on the ground of illegality, the money collected must be repaid.

The demand was denied by the Board. It was in the form presented by either Sections 3804 or 3804a. The action which the petitioner prays be taken in cancelling the assessment is merely less than the petitioner, under the plain provisions of the Sections, was entitled to demand. Respondents, therefore, have no occasion to quibble here over a point which could easily have been cleared in the State Courts if they called attention of Court or counsel thereto.

The statutes are remedial and should be liberally construed to carry out their intent and object.

Pacific Coast v. Wells, 134 Cal. 471-75.

The Court quotes from a New York case the following:

> "This proceeding is not governed by the technical rules that apply to actions at law to recover money voluntarily paid, or to suits in equity to remove a cloud upon title. The statute furnishes a convenient and summary remedy which enables the county to

restore, without litigation or expense, what it ought not to retain, and a citizen who has paid an illegal tax, without waiting to have his property advertised and sold, to obtain justice."

Orpheum Circuit v. County of L. A., 12 Cal. App. (2d) 257-61;

Otis v. San Francisco, 170 Cal. 98;

Associated Oil v. County of Orange, 4 Cal. App. (2d) 5-11.

As stated "demand for refund" necessarily includes "demand for cancellation." There necessarily could have been no denial if presentation had not been made. It is not part of good pleading to allege evidentiary matters.

III.

Mandamus Is the Proper Remedy Under Settled California Law in Case of Rejection by the Board of Supervisors.

Los Angeles v. Board of Supervisors (*supra*), 108 Cal. App. 655-66;

Central Mfg. Dist. v. Board of Equalization, 214 Cal. 288-91.

There are, it is true, alternate methods of recovery for taxes illegally exacted, but under California law, as stated in the cases cited, under heading III, and as summarized in the last case above cited, the writ of mandamus is a proper remedy to compel the Board to cancel the assessment, refund the taxes paid, or either thereof, whenever the taxes have been erroneously or illegally collected. The prerequisite is merely a verified demand such as here made. The Supreme Court of California, in 1931, in the case last cited stated the State rule when it was "It is conceded that mandamus is the proper remedy."

IV.

The Verified Demand Set Forth Facts Which Brings the Case Under the Federal Constitutional Prohibition Upon State Taxation. It Thereby Showed An Illegal Collection of Taxes.

The affidavit of Thomas W. Dant sets forth that the lumber in question was imported from the Philippine Islands and at the time of assessment was in the same shape and condition as when imported; that none was sold and none intended to be sold in California. This is a substantial compliance with the statute.

Substantial compliance with the statute as to filing of claim is all that is necessary.

> *Sandstoe v. A. T. & S. F. Ry.*, 28 Cal. App. (2d) 215-23;
>
> *Uttley v. Santa Ana*, 136 Cal. App. 23.
>
> "When there is no evident intention to mislead but a *bona fide* attempt to comply with the law, the notice is sufficient in the absence of any evidence that it did in fact mislead."

The purpose of the statute is accomplished if the matter is brought to the attention of the proper officials in order that they may be advised as to the position taken as to liability for payment.

Again, this is the first time that the insufficiency of the claim has been raised. The counsel for both parties argued and submitted the case, all understanding thoroughly that a clear and valid claim was filed. It is to be noted the claim was alleged to have been filed with respondent's counsel here appearing. The claim is, under California law, sufficient.

V.

The Proof Requirement.

No California decisions supporting the position taken by respondents under this head are cited. This is apparently for the reason that the only discoverable citation is adverse. The "satisfactory proof" provision of Section 3804a was evidently inserted as a verified claim is not there required. The sworn affidavits here necessarily fill the place of satisfactory proof. The following noted case was under Section 3804a. The demand was unverified and no proof offered to substantiate the claim. It seems to be the only case upon this point. It is adverse to the position of respondents on the demand for "satisfactory proof." It is practically the same question as here raised. In the case above cited of *Los Angeles v. Board of Supervisors*, 108 Cal. App. 655, the same question as to the request of proof was raised. The trial court stated, in denying mandamus that at the hearing before the Board no evidence was offered by the petitioner (p. 655). The form of the demand, similar to that in the case at bar, is set forth in *haec verba* (p. 660). The assessments were by the filing of the demand, as public records, before the Board. The assessments, together with the demand, were sufficient to cause the Board to take proper action. The judgment of the trial court was accordingly reversed.

Conclusion.

A vitally important Federal question is here raised. The State Court has decided adversely to the Federal right asserted. The matter of State practices has been raised for the first time. It was never considered by any of the three State Courts. Examination of the points in the light of California State law shows that they would not have been valid objections to the procedure adopted in the State Courts.

In the interests of justice, of economy, and expedition in the determination of the important Federal question raised by the three State Court decisions, petitioner prays on its own behalf, and on behalf of the great foreign import business, that this Honorable Court consider and determine these vital Federal questions.

Respectfully submitted,

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